87-523

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAUL N. CARLIN,

Petitioner,

v.

JOHN R. McKEAN, Individually and as a member of the Board of Governors of the U.S. Postal Service, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert A. Saltzstein*
Joseph J. Saunders
Stephen M. Feldman

Wyatt & Saltzstein
1725 DeSales Street, N.W.
Washington, D.C. 20036
(202) 638-4485

Attorneys for Petitioner
**Counsel of Record for Petitioner Upon Whom Service Is To Be Made*

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QUESTIONS PRESENTED

1. Whether the fraud exception to the general rule against judicial review of agency discretion enunciated in *U.S.* v *Arredondo,* 31 U.S. (6 Pet.) 691 (1832), requires judicial review of the removal of a Postmaster General of the United States procured by fraud.

2. Whether the decisional vote of the Governors of the U.S. Postal Service removing petitioner from office was tainted and therefore invalid because of participation by Governors who were disqualified from voting.

3. Whether the required number of votes to remove a Postmaster General existed as a matter of law when two of the votes necessary for the required absolute majority of Governors in office were cast by disqualified voters, and without these two votes the required statutory number of votes was not attained.

LIST OF ALL PARTIES TO THIS PROCEEDING

In accordance with Rule 21.1.(b) of this Court's rules, the following is a list of all parties to this proceeding.

Paul N. Carlin	Petitioner
John R. McKean	Respondent
Peter E. Voss	Respondent
George W. Camp	Respondent
John L. Ryan	Respondent
Ruth O. Peters	Respondent
John N. Griesemer	Respondent
Jackie A. Strange	Respondent
Tyler McConnell	Respondent
Robert Setrakian	Respondent
United States Postal Service	Respondent

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Paul N. Carlin, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* 1a-11a) is reported at 823 F. 2d 620. The memorandum opinion of the District Court for the District of Columbia (App., *infra,* 17a-31a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals (App., *infra,* 12a-13a) was entered on July 17, 1987. A timely petition for rehearing and a suggestion for rehearing en banc were denied on September 25, 1987 (App., *infra,* 14a and 15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 202 and 205 of the Postal Reorganization Act (39 U.S.C.), Sections 208(a) and 1905 of the Criminal Code (18 U.S.C.), and Sections 201 and 205 of Executive Order 11222, "Standards of Ethical Conduct for Government Officers and Employees," are set out in the statutory appendix (App., *infra,* 33a-35a).

STATEMENT

A. Background

1. Petitioner Paul N. Carlin became the 66th Postmaster General of the United States on January 1, 1985, having been appointed to the office by the Governors of the U.S. Postal Service in the preceding November. (C.A. J. App. 20).

Much of the factual information recited below, which confirms allegations in Carlin's complaint, is derived from pleadings and statements submitted to the U.S. District Court for the District of Columbia in three criminal cases arising out of a grand jury investigation of the postal scandal (Appendices H, I, J and K, infra, 36a-81a), and from a report of the Postal Inspection Service which was released by the House Post Office and Civil Service Committee in May 1987. (Appendix L, *infra,* 82a-124a).

Even prior to Carlin's assumption of office, Postal Governor Peter E. Voss began laying the groundwork for influencing Carlin to favor Recognition Equipment Company, Inc. (REI) of Dallas, Texas, in procurement decisions concerning optical character reading (OCR) equipment (App., *infra,* 104a). In January 1985 Voss began to receive clandestine payments from Gnau Associates, Inc. (GAI), a consulting firm to REI, to influence OCR procurement decisions at Postal Headquarters in favor of REI. If REI were to obtain contracts under an expected $250-$400 million procurement program, Voss would receive a percentage of their gross value (App., *infra,* 42a, 105a).

Voss' efforts to steer contracts to REI were furthered by Postal Governor Ruth Peters, whom Voss manipulated into becoming an unethical advocate within the Postal Service for procurement of REI equipment, even to the point of issuing directions favorable to REI to Postal Service executives which she represented as Board of Governors' instructions, but which she had not in fact been authorized by the Board to issue (App., *infra,* 108a, 110a, 112a, 113a). Peters also disclosed to REI's representatives information which had been submitted to the Postal Service by REI's competitors, as well as information as to matters occuring at closed Board of Governors' meetings (App., *infra,* 311-312). Peters requested REI representatives to furnish her materials and analyses that she could use to further REI's interests. She then passed this material on to the Board of Governors and to Postal Service executive officers as her own work product (App., *infra,* 94a, 111a, 113a). An REI representative prepared testimony which Peters delivered to Congress as the work product of the Governors' Technology Committee which she chaired (App., *infra,* 110a-111a).

Voss and Peters constantly pressured Carlin and other Postal Service executives to award contracts for OCR equipment to REI (C.A. J. App. 22, 23, 26, 27, 28, 36; App., *infra,* 313a-317a). The Postal Inspection Service Report characterized Voss' and Peters' pressure on Carlin as "relentless" (*App., infra,* 115a).

Throughout 1985, Postmaster General Carlin steadfastly resisted the pressures exerted on him by Voss and Peters to award non-competitive contracts for untested equipment to REI (C.A. J. App. 22-28; App., *infra,* 114a-117a). Ultimately, in late summer of 1985, Voss, John Gnau, Jr., Chairman of GAI, and Michael Marcus, vice president of GAI, all of whom have since been criminally prosecuted and sentenced for actions relating to this Postal Service OCR procurement, together with William Spartin, President of GAI, and others who have not been publicly identified in the Government's still continuing grand jury investigation, concluded that Carlin was a "stumbling block" to their plan to obtain non-competitive OCR contract awards for REI, and that he would have to be removed from the position of Postmaster General if their scheme were to succeed. They began plotting Carlin's removal (App., *infra,* 115a). At the same time, the monthly fees which REI paid to GAI, one quarter of which were turned over to Voss, were increased by $22,000 per month (App., *infra,* 116a).

Inside the Board of Governors of the Postal Service, Voss, aided by Peters, began to implement the campaign to remove Carlin (App., *infra,* 115a-116a). Voss and Peters furnished internal Postal Service information to Marcus. One of Marcus' primary tasks, as the conspiracy was outlined by the Government in the Marcus criminal case, was to "create distrust by other Board of Governor

members of (1) REI's competitors, (2) the Postmaster General, (3) the rest of the United States Postal Service management" (App., *infra,* 78a). Marcus "served as a knowing conduit of internal board and postal management information and documents from Voss to REI" (App., *infra,* 79a).

In October 1985, Voss and Peters "stepped up the campaign" (App., *infra,* 118a). "Voss did everything to undermine Paul Carlin except possibly hiring a private detective to follow Carlin" (App., *infra, 118a).* As part of his campaign, Voss manipulated Governor McKean into agreeing that Voss could start a "search" for a replacement for Carlin. Voss suggested that William Spartin be retained to conduct the "search," and McKean acquiesced (App., *infra,* 120a). As previously indicated, Spartin was an officer of GAI through which REI payments were being funnelled to Voss. Spartin made kick-back payments to Voss in the amount of $4,300.00 from the funds he received from the Postal Service for conducting the "search" (App., *infra,* 119a).

In mid-December, 1985, Spartin discussed the "search" for Carlin's replacement with REI's president, William Moore. Moore suggested that Spartin recommend Albert Casey to replace Carlin. Spartin, who was receiving one fourth of REI's payments to GAI (App., *infra,* 105a), followed REI's recommendation and submitted Casey's name to Voss and McKean (App., *infra,* 120a).

Other Postal Governors were not informed about the "search" for someone to replace Carlin (C.A. J. App. 35). The existence of the search was so closely held from the other Governors that, according to the Postal Inspection Service Report, even Governor Peters, who in October had cited Carlin's attitude on the OCR issue as a reason to

remove him, now claims not to have known that a "search" was going on (App., *infra,* 121a). On January 6, 1986, at a meeting of which no public notice had been given, and without advance notice to the other Governors that the matter would be on the agenda, both of which are required by Postal Service regulations (39 C.F.R. 5.1 and 7.5), Voss disclosed to the Governors for the first time that a "search" for a replacement for Carlin had been conducted and that it had resulted in the choice of Casey as a replacement for Carlin (App., *infra,* 121a) Citing derogatory information concerning Carlin which he claimed to have developed in his role as the principal manager of the affairs of a "contingency committee," whose formation and operation had never been approved by the Board of Governors as required by Postal Service regulations (39 C.F.R. 3.4 and 5.1), Voss engineered an immediate vote on Carlin's removal (C.A. J. App. 8-9).

In pressing for Carlin's removal, Voss did not disclose to the Governors that he was receiving payments through GAI to further REI's interests at the Postal Service, that he and GAI and other persons had plotted to have Carlin removed from office because Carlin was a "stumbling block" to award of OCR contracts to REI, or that his recommendation to the Governors to remove Carlin was the culmination of that plan. Nor did Voss reveal that Spartin, the person who conducted the "search" for Carlin's replacement, was an officer of GAI through whom REI monies were being funnelled to Voss, or that Spartin was also paying Voss a kickback out of the fee Spartin received from the Postal Service for conducting the "search," or that Spartin was receiving one fourth of a monthly payment of $22,000.00 from REI to GAI, or that Spartin and Voss would receive, parts of a commission of one percent on the gross value of any contracts that REI

would receive, or that Casey, whom Voss was recommending as the replacement for Carlin, was REI's nominee for Postmaster General (App., *infra,* 123a-124a).

Influenced by Voss' denunciation of Carlin and his strong recommendation of Casey, and unaware of the corrupt motivation of Voss, four Governors, plus Voss and Peters, voted at that January 6, 1986 meeting to summarily remove Carlin (C.A. J. App. 9, App., *infra,* 96a).

When Casey assumed office, one of his first actions was to remove Senior Assistant Postmaster General Jellison who, like Carlin, had adamantly opposed noncompetitive contract awards to REI. Casey later testified before the House Post Office and Civil Service Committee that Jellison's removal was "predestined." The Postal Inspection Service Report noted that "[i]t appeared that Mr. Casey had not been in the job long enough to evaluate individual capabilities before making personnel changes" (App., *infra,* 96a-97a). The Report also observed that:"Incident to Jellison's removal, GAI renewed its attempts to secure a sole source award on behalf of REI" (App., *infra,* 122a).

When information about the corrupt activities of Governor Voss began to surface in mid-1986, Paul Carlin commenced the civil action involved in this appeal. It was months later, however, before developments in the three criminal cases arising out of the postal scandal brought about the disclosure by the U.S. Attorney, both in pleadings and in presentencing statements to the District Court, that the removal of Paul Carlin from the office of Postmaster General had been one of the objects of a criminal conspiracy among Voss, Gnau and others to defraud the

Postal Service. Paragraphs 10(c), 11.19, 11.25, and 11.26 of the Information in the *Gnau* criminal case refer to this (App., *infra,* 54a, 58a, 59), as does the Government Memorandum in Aid of Sentencing in the same case (App., *infra,* 69a). The latter memorandum described the Gnau-Voss conspiracy charged in the *Gnau* case, in which Voss was named as a co-conspirator, as a "massive scheme to do nothing less than 'capture' and 'own' the U.S. Postal Service" and eventually to achieve a reorganization that would "result in the displacement of 30-50 top and middle level USPS managers," through which they "planned to manipulate the Postal Service for personal gain for years into the future" (App., *infra,* p. 70a).

B. The Proceedings Below

In his complaint, Carlin requestd a declaratory judgment that his removal had been unlawful because, among other things, it had been procured by the fraudulent conduct of Voss which was designed to further his felonious activities (C.A. J. App. 8-9). Injunctive relief was also requested.

A Government motion to dismiss the complaint was granted by the district court on July 18, 1986. The district court held that Carlin's claims were not justiciable because Congress had granted the Postal Governors "unfettered authority to remove the Postmaster General on the basis of any or no information and for a good reason, bad reason, or no reason at all." *Carlin v. McKean,* No. 86-1811, mem. op. at 10 (D.D.C. July 18, 1986) (App., *infra,* 25a).

Petitioner's motion to the court of appeals for the District of Columbia for an injunction pending appeal was denied without opinion in an order dated August 12, 1986.

In his appeal to the Court of Appeals, petitioner argued that judicial review of the Governors' removal action was justiciable because the allegations that the removal decision had been procured by Voss' fraud brought the case within the fraud exception to preclusion of judicial review which the Supreme Court and the circuit courts have repeatedly proclaimed.

On the basis of additional information which had come to light in the criminal cases, petitioner pressed two other arguments. The first of these was that Voss' participation in the decision tainted the entire vote because Voss' personal financial interest in the outcome of the vote rendered him a disqualified voter and, since the influence of a disqualified voter on the other decision makers cannot be determined, the entire vote must be invalidated. Petitioner also argued that Peters was disqualified from voting because of her breaches of her fiduciary duties as a Postal Governor, her violations of 18 U.S.C. 1905, and her violations of Executive Order 11222, "Standards of Ethical Conduct for Government Officers and Employees." The other argument made was that the vote of an absolute majority of Governors in office required by the statute was not attained because the votes of two disqualified Governors – Voss and Peters – must be thrown out, and without these votes there was not the affirmative vote of an absolute majority required by the statute.

The court rejected all of these arguments, treating the case as presenting essentially a question of statutory construction, and finding that "Congress' intent to preclude review is sufficiently clear from the language, structure and background of the statute that it does not lend itself to any such [fraud] exception" (App., *infra,* 10a). The court also cited the case of *In re Hennen*, 38 U.S. (13 Pet) 230

(1839), in further support of its conclusion that the Governor's removal decision is not reviewable in the courts (App., *infra,* p. 7a). Whereas petitioner had claimed that his challenge to the Governors' legal capacity to remove him by the January 6, 1986 vote was justiciable, the Court labeled petitioner's claims "an attempt to clothe in procedural disguise a determination that goes to the merits," and denied jurisdiction on that basis (App., *infra,* 10a-11a).

Petitioner's motion for rehearing and suggestion for rehearing en banc were denied by orders dated September 25, 1987 (App., *infra,* 14a-15a).

REASONS FOR GRANTING PETITION

A. Refusal of the Court of Appeals to Apply the Fraud Exception Conflicts With Precedents of This Court Enunciating the Fraud Exception

1. The Court of Appeals has decided an important question involving judicial review that directly conflicts with the fraud exception which this Court has maintained for more than 150 years. Under this rule, even as to matters committed entirely to agency discretion, judicial review is always available if fraud is involved. This Court has repeatedly stated this principle, beginning with *U.S. v. Arrendondo,* 31 U.S. (6 Pet) 691 at 729 (1832), in a long line of cases. *Voorhees et al. v. Jackson, ex dem. the Bank of the United States,* 35 U.S. (10 Pet.) 449, 478 (1836); *Bartlett v. Kane,* 57 U.S. (16 How.) 262, 272 (1853); *Sabariego v. Maverick,* 124 U.S. 261, 282 (1887); *U.S. v. California & Oregon Land Co.,* 148 U.S. 31, 43 (1892); *Adams v. Nagle,* 303 U.S. 532, 541-542 (1937); and *Federal Reserve System v. Agnew,* 329 U.S. 441, 444 (1946). In *U.S. v. Wunderlich,* 342 U.S. 98, 100 (1951),

this Court described fraud as "the exception which this Court has heretofore laid down and to which it now adheres *without qualification.*" (Emphasis added.)

In *Arredondo, supra,* the Supreme Court said:

> *It is an universal principle* that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confined to his or their discretion; the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. *The only questions which can arise* between an individual claiming a right under the acts done, and the public, or an individual denying its validity, *are power in the officer, and fraud in the party.* (Emphasis added.)

This "universal principle," of which the fraud exception is a key component, has been referred to so often by this Court that it brooks no dissent. Yet, the court of appeals refused to acknowledge the fraud exception and accord it the vitality which it is due. The court of appeals even questioned the existence of this undeviating rule of law, referring to it instead as "the *alleged* fraud exception." (Emphasis added.) (App., *infra,* 9a.) There is nothing "alleged" about the Supreme Court's fraud exception. It is settled law.

In *Curran v. Laird,* 420 F. 2d 122, 131 (D.C. Cir. 1970), *on rehearing en banc,* the Court of Appeals for the District of Columbia Circuit stated as follows:

> This case does not remotely involve and there is no claim seeking, the kind of exception that may justify judicial review in certain instances even as to matters generally committed to the final judgment of an official. These exceptional

> instances relate to a case where there has been not merely a contention of error or abuse of discretion, but also facts adduced in support of *a claim of the kind of bad faith, fraud, or conscious wrongdoing which in effect undercuts the assumption that the personnel involved have been genuinely acting as government officials.* (Emphasis added.)

Id. at 131.

In *Local 2855, AFGE (AFL-CIO) v. U.S.*, 602 F. 2d 574 (3d Cir. 1979), the Third Circuit similarly indicated that the courthouse door is always open when an otherwise unreviewable agency decision is procured by fraud.

> Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command.

Id. at 580.

All the foregoing cases prove indisputably that the ancient common law principle that fraud is a ground for review of otherwise unreviewable agency discretion is just as binding on the courts today as it was in *Arredondo, supra,* in 1832.

2. The instant case raises precisely the issue of fraud in connection with the exercise of agency discretion which *Arredondo* and its progeny have held is always reviewable by the courts. Postmaster General Carlin has adduced facts "in support of a claim of the kind of bad faith, fraud, or conscious wrongdoing which in effect undercuts the assumption that the personnel involved [were] genuinely act-

ing as government officials." *Curran v. Laird, supra,* at 131.

Neither Voss nor Peters were genuinely acting as government officials. Voss was being bribed to corruptly exert his influence in the Postal Service, even to the extent of conspiring with persons outside the Postal Service to bring about the removal of a Postmaster General of the United States. He engaged in this fraudulent activity as a member of the very Board which had the power to appoint or remove a Postmaster General. Peters, as the Postal Inspection Service's report discloses, repeatedly violated her fiduciary obligations as a Governor of the Postal Service. *Supra* at 3. She violated 18 U.S.C. § 1905 by disclosing to REI confidential Postal Service information and information that REI's competitors had submitted to the Postal Service in confidence, and also violated §§ 201 and 205 of Executive Order 11222, "Standards of Ethical Conduct for Government Officers and Employees," which prohibit "giving preferential treatment to any organization or person," or "losing complete independence or impartiality of action," or "permitting others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

Neither could the other Governors have been *genuinely* acting as government officials when they removed Carlin because they were prevented from doing so by the trickery of Voss. Among other things, Voss concealed (1) that he had a personal financial interest in Carlin's removal; (2) that he was proposing the removal of Carlin pursuant to a criminal conspiracy, and (3) that the proposed successor to Carlin had been nominated by REI. By then precipitating an immediate vote, Voss, aided by Peters, manipulated the Governors into taking action which honest government of-

ficials simply would not have taken had they been aware of the deceit.

As Congressman Sikorsky stated on June 25, 1986 to the assembled Governors at a House Post Office and Civil Service Committee hearing concerning the postal schandal: "My question to each of you is, Have your olfactory glands failed? This thing smells worse that pig barns I cleaned out growing up."[1]

3. The court's other grounds for withholding judicial review in the face of fraud also collapse upon analysis.

First, the Court's opinion stated that the agency discretion "cases cited by Carlin all deal with strictly financial matters" (App., *infra,* 8a). But this is not true. Even if it were true, it is immaterial because the Supreme Court has repeatedly stated that judicial review is available "without qualification" where fraud is charged. *Wunderlich, supra,* at 100. And in the case at bar, fraud is not just charged, it has been proven by guilty pleas in three criminal cases in the district court and by a Postal Inspection Service report. Fraud is fraud, and the court of appeals' attempt to crab judicial review in the presence of fraud, by making a specious distinction between fraud in a removal case and fraud in a financial case, is erroneus judicial legerdemain.

[1] *Oversight Hearings on United States Postal Service Board of Governors, Hearing Before the House of Representatives Committee on Post Office and Civil Service,* 2d Sess., 63 (1986). The Board of Governors abolished all committees except the audit committee. Abuse of the Board's committees had facilitated the fraud which the grand jury investigation had disclosed. Under White House pressure, former Board chairman McKean resigned. Under the leadership of his successor, Chairman John Griesemer, the Board of Governors adopted a Code of Ethics for Governors. While these were steps in the right direction, Paul Carlin remains the key victim of the "massive scheme" of fraud described by the U.S. Attorney in the *Gnau* criminal case.

@ Following the above hearing.

Moreover, the cases cited by petitioner to the court of appeals did *not* involve only "financial matters." *Hondros* v. *United States Civil Service Commission,* 720 F. 2d 278, 293 (3rd Cir. 1983), which petitioner cited, was a personnel removal case in which the Third Circuit stated that otherwise unreviewable agency discretion can be reviewed by courts where the agency decision was occasioned by "impermissible influences," including fraud. *See Local 2855, supra* at 580. *Curran* v. *Laird, supra,* involved an exercise of discretion by the Secretary of Defense having nothing to do with finance. Both of these were non-financial cases, yet, so intent was the court on denying petitioner a trial of his claims that his removal was procured by fraud that it brushed precedent aside.

4. In declining to exercise its duty to review Carlin's fraud charges, the Court stated: "Here Congress' intent to preclude review is sufficiently clear from the language, structure and background of the [Postal Reorganization Act] that it does not lend itself to any such exception" (App., *infra,* 10a). But the fundamental premise underlying every reference to the fraud exception by the Supreme Court and the circuit courts (see cases cited, *supra* at 10), has been that the "language, structure and background" of the relevant statute clearly indicated Congressional intent to preclude judicial review. It is in this precise situation, where judicial review is not ordinarily available, that review *is* available to a litigant to raise the questions *Arredondo* characterized as "power in the officer, and fraud in the party," which are always reserved for judicial review.

5. The power and duty of the courts to review fraud in connection with agency decisions has never been repealed as to matters entrusted to the discretion of the Postal Service. Federal courts interpret federal stautes as consistent

with existing common law principles such as the fraud exception, unless a contrary legislative intent clearly appears. *Tarlton* v. *Saxbe,* 507 F.2d 1116, 1122 (D.C. Cir. 1974). Repeals by implication will not be found unless an intent to repeal is clear and manifest. *Watt* v. *Alaska,* 451 U.S. 259, 267 (1981); *U.S.* v. *Hansen,* 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. den.* ____ U.S. ____, 89 L Ed. 2d 571. The rule of statutory construction is that if Congress intends legislation to change common law, it writes that intent into the statute. *Midatlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, ____ U.S. ____ (1986), 88 L.Ed. 2d 859, 866 (1986). No intent to preclude judicial review of fraud was ever written into Title 39. Therefore, fraud remains a vital basis for review of removal actions under § 205(c) of the Postal Reorganization Act.

6. Finally, the court held that under the reasoning in *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), there is no authority in the courts to control the removal of Carlin (App., *infra,* 7a). But *Hennen* did not involve allegations of fraud. Therefore, by the very same reasoning the court applied to petitioner's reliance on *Board of Governors* v. *Agnew,* namely, that a claim of fraud had not been made in that case (App., *infra,* 9a), the court of appeals reliance on *Hennen* is equally unwarranted. Since Hennen did not involve a claim of fraud, it is not a precedent as to the instant case.

The Court was also in error in including fraud within "abuse of power," as that term was used in *Hennen*. This was the only way the Court could make *Hennen* superficially applicable to this case and justify its holding that "we have no right to judge upon this matter" of fraud (App., *infra,* 7a). However, a decision obtained by misrepresentation and deception perpetrated *upon* an agency is certainly not an abuse of power *by* the agency.

Fraud is not within the meaning of abuse of power or discretion.

Thus, the 1839 *Hennen* case is no precedent for taking the Postal Governors' decision involved here out of the court's power to review discretionary agency action involving fraud. The fraud exception is embedded in American jurisprudence as demonstrated in the long line of Supreme Court cases cited *supra* at 10, beginning with the 1832 *Arredondo* and 1836 *Voorhees* cases which set forth a principal of law older and more venerable than *Hennen*. Due regard for 155 years of Supreme Court precedent *requires* the granting of judicial review in this case, not denial of an individual's right of access to the courts.

B. Refusal of the Court of Appeals to Review Petitioner's Contention that Two Postal Governors Were Disqualified from Voting and as a Result the Entire Vote Was Tainted and an Insufficient Number of Votes for Removal Were Cast Disregards Precedents of this Court and Conflicts with Decisions of other Circuits.

39 U.S.C. § 205(C)(1) provides "that in the appointment or removal of the Postmaster General . . . a favorable vote of an absolute majority of the Governors in office shall be required[.]" Petitioner contended that two Governors were disqualified from voting on his removal, and that the votes of these disqualified Governors could not lawfully be counted in determining whether the number of votes for removal required by § 205(c)(1) had been cast. Appellant also claimed that the participation of even a single disqualified voter – here there were two – fatally tainted the entire vote of the Governors.

The court of appeals held that judicial review of these allegations is limited solely to determining whether a *pro*

forma majority of Governors in office voted to remove Carlin. Labeling Carlin's argument "an attempt to clothe in procedural guise a determination that goes to the merits" (App., *infra,* 11a), the court side-stepped its responsibility to determine whether as a matter of law the required vote for removal had occurred.

This abdication of judicial responsibility to determine whether a proper and lawful vote on Carlin's removal occurred is in conflict with *Arredondo's* requirement that the question of whether an agency has exercised its power and discretion in the manner required by statute is always subject to judicial review. The court of appeals' holding is also in confict with decisions of the third and sixth circuits relating to tainted votes of multi-member decision-making bodies. For these reasons, the exercise of this Court's supervision over the lower courts through its certiorari powers is necessary and appropriate in this case.

1. When the legal validity of an agency's vote is challenged, *it is a judicial duty* to determine whether the agency was legally qualified to act and whether the vote was conducted in accordance with law. Contrary to the court's view that Carlin would put at issue the Governors' "motivations," what Carlin has put at issue is the *legal capacity* of the Governors to act in the matter involved, and their compliance with the statute's requirements for a valid majority vote. Judicial review is always available to determine, even as to decisions committed to agency discretion, whether an agency acted within the power conferred and the limitations imposed. *U.S.* v. *Arredondo, supra*, at 729; *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958).

As a matter of law, the votes of two Governors to remove Carlin were invalid votes. To begin with, Voss was specifically prohibited from voting on Carlin's removal. Under the language of 18 U.S.C. § 208(a), which

prohibits an officer from participating in any matter in which he has a financial interest, Voss was disqualified from participating in the decision to remove Carlin. Carlin was an obstacle to Voss' scheme to obtain kickbacks on Postal Service contract awards to REI, so Voss had a financial interest in having Carlin removed. Thus, under § 208(a), as well as under common law principles, Voss was barred from voting on Carlin's removal.

18 U.S.C. § 208(a) makes no distinction among functions, i.e., judicial, quasi-judicial, administrative, or other determinations. It disqualifies an officer with a financial interest from every conceivable type of decision-making. *See United Farm Workers of America, AFL-CIO* v. *Arizona Agricultural Employment Violations Board,* 727 F.2d 1475, 1477-1478 (9 Cir. 1984). The interest of an officer may be held to be ground for disqualification even when the action taken involves neither adjudication nor anything resembling adjudication. 2 Davis, Administrative Law Treatise, 1958, § 1203, at 161.

Peters was enjoined by statute (18 U.S.C. § 1905) and by Executive Order 11222's "Standards of Ethical Conduct for Government Officers" to refrain from collaborating with Voss and REI, a postal equipment supplier, as she did to further REI's interests, including removing Carlin. Hers, too, was a disqualified vote.

2. In addition to the legal disability of Voss and Peters to vote on Carlin's removal, their participation tainted the entire vote. They poisoned the well: In a multi-member agency decision it is impossible to know the influence of the disqualified voters on the other voters; therefore, the decision must be set aside. *American Cyanamid Company* v. *F.T.C.,* 363 F.2d 757 (6th Cir. 1966); *Berkshire Employees Association* v. *N.L.R.B,* 121 F.2d 235, 239 (3rd

Cir. 1941); *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970); *WKAT* v. *FCC*, 296 F.2d 375, 382-383 (D.C. Cir. 1961) *cert. denied*, 368 U.S. 841 (1961); *Pyatt v. Mayor and Council of Borough of Dunnellen in Middlesex County*, 9 N.J. 548, 89A. 2d 1 (1952) (opinion per Brennan, J.); 1 Am Jur. 2d Administrative Law § 68 (1962), at 864.

There is no question here of the substantial influence of the disqualified voters[2]. Voss, from his dual position as chairman of an illegal "search" committee and from his domination of the Board of Governors Technology Committee, ostensibly chaired by Peters, manipulated the Governors to eliminate Carlin. Indicative of Voss' influence with the other governors is the fact that they elected him vice chairman of the Board of Governors the day after he succeeded in having Carlin removed (App. *infra*, 82a).

As previously mentioned, Peters collaborated with Voss at every turn. After Postmaster General Carlin on July 14, 1985 issued a memorandum to the Board of Governors disclosing the steps he was taking "to insure the absolute

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[2] The criminal conspirators' confidence that Voss' influence with the Governors was powerful enough to pull off Carlin's removal is indicated by the "young woman on the train" incident in the Postal Inspection Service Report. On December 13, 1985, a woman, subsequently identified as John Gnau's daughter, casually told a Postal Inspector, who in conversation had mentioned merely than he was a Postal Service employee, that Carlin would be fired at the Board of Governors meeting three weeks later, and that the Postal Service would soon purchase OCR equipment from REI. (This was one day after REI's president Moore had proposed that Albert Casey be made Postmaster General). (App., *infra*, 94a-95a). The Postal Inspection Service indicated that this occurrence and the summary dismissal of Carlin on January 6, 1986, spurred it to discover connections between REI and the Technology Committee (App., *infra*, 95-a96a).

impartiality and fairness of the procurement process" (C.A. J. App. 38), Peters urged that Carlin be removed and Voss be appointed Postmaster General. (App., *infra,* 115a-116a). She disregarded advice from counsel for the Board of Governors that her actions in connection with REI representatives were improper or had the appearance of impropriety (App., *infra,* 115a). In the words of Executive Order 11222, "Standards of Ethical Conduct for Government Officers and Employees," Peters had "[lost] complete independence or impartiality of action." She was not "genuinely acting as a government official." *Curran* v. *Laird, supra*, at 131.

3. 39 U.S.C. § 205(c)(1)'s requirement of an affirmative vote by an absolute majority of Governors in office was not met in Postmaster General Carlin's purported removal from office. There were eight Governors in office. An absolute majority of that number was five. While six Governors voted to discharge Carlin, two of the Governors were disqualified, as discussed above.

Since Voss' and Peters' votes on Carlin's removal were invalid and could not be counted, there were only four valid votes to remove Carlin. Thus, the absolute majority of five out of the eight Governors in office required to remove Carlin was lacking, and the Governors' purported removal action did not comply with 39 U.S.C. § 205(c)(1). The vote was thus illegal.

Votes by decision-makers disqualified by personal financial interest or by improper outside influence are invalid and must be thrown out. *See Cinderella Career and Finishing Schools, Inc.* v. *F.T.C., supra; WKAT* v. *FCC, supra.*

Arredondo, supra, and numerous other opinions of this court cited *supra* at 10, as well as *Local 2855, supra,* and

the District of Columbia Circuit decision in *Doe* v. Casey, 796 F.2d 1508 at 1518, n. 33, state that

> even where complete discretion is confided in an agency judicial review is always available to determine whether the agency's decision violates any statutory command.

Nevertheless, the court of appeals refused to grant Carlin the right to have the issues of alleged voter disqualification, tainted decision, and sufficiency of lawful votes for removal tried in the district court.

Conclusion

There has been much public discussion in the past month about the availability of judicial review to protect individual rights, and about adherence to Supreme Court precedents.

In the instant case, a Postmaster General was removed from office by a vote which was fraudulently procured by a corrupt Postal Governor. The removal was further tainted by the voting participation of that corrupt Governor, despite his disqualification for financial interest and a statutory bar to his participation, and by the participation of another Governor who had lost complete independence and impartiality of judgment and was not geniunely acting as a government employee. Yet the Court of Appeals, disclaiming any obligation to inquire into the allegations of vote insufficiency and fraud, a duty which it is required to perform under the long-standing common-law precedents of *Arredondo* and its progeny, has slammed shut the courthouse door to the Postmaster General's petition for judicial review of his removal. This is an appeal in which an individual who was faithful to his public trust as Postmaster General seeks to prevent judicial trampling of his right to a trial.

If ever a case cried out for judicial review to protect individual rights, this is that case. For the legal reasons indicated above, this Court should grant this petition for certiorari.

Respectfully submitted,

Robert A. Saltzstein

Joseph J. Saunders

Stephen M. Feldman

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5510

PAUL N. CARLIN, APPELLANT

v.

JOHN R. MCKEAN, individually and as a member of the Board of Governors of the U.S. Postal Service, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 86-1811)

Argued May 19, 1987

Decided July 17, 1987

Robert A. Saltzstein, with whom *Joseph J. Saunders* and *Stephen Feldman* were on the brief for appellant.

John Oliver Birch, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth*, *Deborah A. Robinson*, and *R. Craig Lawrence*, Assistant United States Attorneys, and *Louis*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

A. Cox, General Counsel, U.S. Postal Service, were on the brief for appellee.

Before: BORK and STARR, *Circuit Judges*, and EDWARD D. RE,* *Chief Judge*, United States Court of International Trade.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: On January 1, 1985, Paul N. Carlin became the 66th Postmaster General of the United States. Just over a year later, Carlin was removed from that position. Believing that his dismissal was the product of a fraudulent and corrupt scheme, he filed this suit in district court, seeking a declaratory judgment and injunctive relief that would include his reinstatement as Postmaster General. The district court held that the case was not justiciable and dismissed the complaint. We affirm.

I.

A.

Historically, the office of Postmaster General has been a Cabinet post, and holders of the post were appointed and removed directly by the President. In 1970, however, Congress reorganized the Postal Service so that it would operate more along the lines of a private company. *See* Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended at 39 U.S.C. §§ 101-5605 (1982)). The Act created a Board of Governors, composed of eleven members, to "exercise the power of the Postal Service." 39 U.S.C. § 202(a) (1982). Nine of the members are simply "Governors," who are appointed by the President subject to the advice and consent of the Senate. The other two members of the Board are the Postmaster General and the Deputy Postmaster

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1982).

General. *See id.* § 202(c) & (d). Though members of the Board, these two officials are not Governors.

The Postmaster General is the "chief executive officer" of the Postal Service, 39 U.S.C. § 203 (1982), but is no longer appointed and removed directly by the President. Instead Congress provided that

> [t]he Governors shall appoint and shall have the power to remove the Postmaster General. . . . His pay and term of service shall be fixed by the Governors.

Id. § 202(c). The statute says nothing about when and why the Postmaster may be removed from office, but it does say how: "in the appointment or removal of the Postmaster General . . . a favorable vote of an absolute majority of the Governors in office shall be required." *Id.* § 205(c)(1).[1]

B.

On January 6, 1986, the date that Carlin was dismissed, there were eight Governors actually in service. Six Governors voted unanimously to dismiss Carlin. One was absent from the meeting, and one abstained. Carlin's complaint alleges that at least two of the Governors voted to remove him because he was an obstacle to their corrupt scheme to influence the award of Postal Service contracts to particular parties in exchange for illegal kickbacks. These actions alleged are said to constitute violations of the Act and the regulations issued under it.[2]

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[1] 39 U.S.C. § 1001(c) (1982) also states:

> The Postal Service may hire individuals as executives under employment contracts for periods not in excess of 5 years. Notwithstanding any such contract, the Postal Service may at its discretion and at any time remove any such individual without prejudice to his contract rights.

[2] The appeal here is from the district court's grant of defendants' motion to dismiss, and we therefore assume that the

He claims also, and more generally, that his removal was illegal because it was the product of fraud, or at least was ancillary to related fraudulent conduct.

The district court dismissed these claims as not justiciable. The court found that Congress granted the Governors "unfettered authority to remove the Postmaster General on the basis of any or no information and for a good reason, bad reason or no reason at all." *Carlin* v. *McKean*, No. 86-1611, mem. op. at 10 (D.D.C. July 18, 1986). The postal statutes therefore offered no substantive guidelines that a court could apply to evaluate the legality of the Governors' decision to remove Carlin, and no such standards had been established in the agency's own rules. Finally, the court found that it had no authority to order "the extraordinary relief" of Carlin's reinstatement. *Id.* at 16.

II.

This appeal does not present the merits of Carlin's claims but simply the question of the district court's jurisdiction to entertain the suit. Despite Congress' extensive reorganization of the Postal Service in the 1970 Act, to permit the Service to operate in a more "business-like" fashion, the Service clearly remains a government agency—"an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201 (1982); *see also id.* § 409; *Franchise Tax Bd.* v. *United States Postal Serv.*, 467 U.S. 512 (1984); *Beneficial Fin. Co. of N.Y.* v. *Dallas*, 571 F.2d 125 (2d Cir. 1978). The actions of government agencies are normally presumed to be subject to judicial review unless Congress has precluded review or a court would have no law to apply to test the legality of the agency's actions. *See, e.g., Heckler* v. *Chaney*, 470 U.S. 821 (1985); *Block* v. *Commuunity Nutrition Inst.*, 467 U.S. 340 (1984).

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facts are as plaintiff alleges them to be in his complaint. *See, e.g.*, Shear v. National Rifle Ass'n, 606 F.2d 1251, 1253 (D.C. Cir. 1979).

This presumption derives from a reading of section 10(a) of the Administraitve Procedure Act, 5 U.S.C. § 701(a) (1982). Apart from two very limited exceptions, however, the APA is not applicable "to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a) (1982); *see also id.* § 410(b)(1).

It has often been stated that the presumption of reviewability was a firmly rooted principle of administrative law even before the APA was enacted. *See, e.g., Chaney*, 470 U.S. at 832; *Doe* v. *Casey*, 796 F.2d 1508, 1514 (D.C. Cir. 1986), *cert. granted*, 55 U.S.L.W. 3815 (June 8, 1987). That does not mean, however, that courts should continue to indulge a presumption of reviewability under the old administrative law principles when Congress has explicitly exempted an agency from the APA's coverage. In any event, we need not decide that issue here, for we are quite certain that Congress intended affirmatively to preclude judicial review of the Governors' decisions to appoint and remove the Postmaster General. *See* 5 U.S.C. § 701(a)(1) (1982). The Supreme Court has stated that Congress' intent to foreclose review must be shown by "clear and convincing evidence," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967), or at least must be " 'fairly discernible in the statutory scheme.' " *See Community Nutrition Inst.*, 467 U.S. at 351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)). Congress need not say flatly that review is precluded; an examination of several factors may be sufficient to convince the courts that Congress intended that. *See, e.g., Community Nutrition Inst.*; *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Morris* v. *Gressette*, 432 U.S. 491 (1977).

The statutory language here is quite explicit. The Governors are granted full power to appoint and to remove the Postmaster General. 39 U.S.C. § 202(c) (1982). No qualifications whatever are attached to their

exercise of these powers. In the next sentence, Congress reinterated that the Postmaster General's "term of service shall be fixed by the Governors." *Id.* This language unmistakably vests the Governors with complete authority over the Postmaster's tenure and is ample indication that Congress intended to preclude judicial review of their decisions to appoint or remove any person in that post.

The structure of the statute constitutes further strong evidence of Congress' intent. At the same time that Congress placed the removal and the tenure of the Postmaster entirely in the power of the Governors, it provided in the same section that the Governors themselves "may be removed only for cause," 39 U.S.C. § 202(a) (1982), and that the Governors would serve for fixed terms of nine years. *Id.* § 202(b). A similar distinction with respect to removal and tenure is established between "executives" of the Postal Service (and the Postmaster is the "chief executive officer" of the Service, *see id.* § 203) and other officers and employees. Only the latter are to be in the "postal career service," which is a part of the civil service, and are assured "full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions." *Id.* § 1001 (b). By contrast, "executives" may be removed "at [the Postal Service's] discretion and at any time." *Id.* § 1001 (c). In addition, while officers and employees receive the coverage of chapter 75 of title 5 of the U.S. Code, *see* 39 U.S.C. § 1005(a)(1) (1982), which makes them removable only for cause and in accordance with numerous protective procedures, those same protections do not extend to the Postmaster General and other executives. *Id.* § 1005(a)(3).

All of this evidence is in harmony with the traditional understanding that decisions to remove government officials like the Postmaster General, who are not civil servants, are not reviewable in the courts. Appellee has

referred us to the Supreme Court's decision in *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), perhaps a venerable precedent, but one which retains its vitality. There the Court refused to interfere with a district judge's action in discharging a court clerk because the judge wished to hire someone else instead. The Court rested on the propositon that when the law does not fix a tenure of office or require any cause for removal from that office, the office "must be held at the will and discretion of some department of the government, and subject to removal at pleasure." *Id.* at 259. Where that is the case, *Hennen* said:

> then this Court can have no control over the appointment or removal, or entertain any inquiry into the grounds of removal. If the judge is chargeable with any abuse of his power, this is not the tribunal to which he is amenable: and as we have no right to judge upon this matter, or power to afford redress if any is required, we abstain from expressing any opinion upon that part of the case.

Id. at 261-62.

By the same reasoning, we cannot find any authority for the courts to control the removal of Carlin. Under *Hennen's* precise holding, when it is charged that the Governors abused their power in removing Carlin, "this is not the tribunal to which [they are] amenable," and "we have no right to judge upon this matter." 38 U.S. (13 Pet.) at 261.[4] The President had complete authority to remove the Postmaster when that official was a Cabinet member. In reorganizing the Postal Service in 1970, and transferring this authority from the President to the Governors, Congress quite deliberately avoided any

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[4] That does not mean abuses of the sort Carlin alleges must go unchecked. The President can dismiss the Governors for "cause," and, of course, Governors may be charged in court for illegal conduct related to a decision which is itself unreviewable.

break with the historical understanding that the Postmaster serves only at the pleasure of his superiors. We thus conclude that Congress has precluded us from reviewing Carlin's discharge.[4]

III.

Although a finding that Congress precluded judicial review of specific agency actions normally ends judicial inquiry, Carlin raises two further points that we must consider. Both points turn on his allegations that his firing was attributable to fraud and corruption.

A.

The first argument is that, regardless of whether Congress meant to foreclose review, there is an "inherent power of courts to deal with fraud," *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 17 (1972), which seems to stem from "the historic power of equity to set aside fraudulently begotten judgments." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944); *see also United States* v. *Wunderlich*, 342 U.S. 98, 99-100 (1951); *Adams* v. *Nagle*, 303 U.S. 532, 541-42 (1938). There are several problems with this argument. First, the cases cited by Carlin all deal with strictly financial matters—the award of contracts, the grant of patents,

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[4] Carlin has also suggested that we have the power to review his firing by measuring its legality against one of the Postal Service's administrative rules, which states that the Board of Governors "directs the exercise of its powers under management that is expected to be honest, efficient, and economical." 39 C.F.R. § 1.2 (1985). But it is settled law that "an agency cannot create through its implementing regulations a right of review withheld by the underlying statute." Harrison v. Bowen, 815 F.2d 1505, 1517 (D.C. Cir. 1987). In addition, we note that this particular rule would not allow judicial review in any event, since it imposes no specific obligations on the Service and, indeed, appears to be purely hortatory or aspirational in character.

the entry of assessments, and the like. The only mention of this argument in *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947), a case that did involve the removal of officers, came in the Court's summary of the Board's contentions, *id.* at 444, and the Court did not state or even consider whether a claim of fraud itself would provide jurisdiction to review the removal orders. So there is no precedent that a claim of fraud would provide jurisdiction in the case before us.

Second, the "historic power of equity" to which Carlin refers seems to be not a wide-ranging judicial power to correct any and all fraudulent activity that may be brought to a court's attention, but a much narrower power to revise a judgment that was obtained by perpetrating a fraud upon the court. *See, e.g., Hazel-Atlas Glass Co.*, 322 U.S. at 244-46; *United States* v. *Throckmorton*, 98 U.S. 61, 64-69 (1878). Yet here the argument does not seem to be that Carlin's dismissal was achieved by perpetrating any specific fraud upon the agency, but that some of those who pressed for his discharge were motivated at least in part by their desire to further other fraudulent activity that was occurring elsewhere. This court would undertake a broad expansion of the alleged fraud exception if it were to assume jurisdiction in this case.

Third, and most important, we would turn this claimed judicial power on its head if we were to find that it controls Congress rather than the reverse. Any power of review to control fraud is conceded to be an equitable or common law power. The legislature possesses the authority to modify the common law by statute. Yet here Carlin asserts that a congressional intent to preclude review of certain agency decisions can be defeated by this "historic" power. We cannot accept that assertion. A weaker and more palatable version of Carlin's argument would rest on a canon of construction: that fraud is an exception to every rule (for example, it typically tolls

a statute of limitations), and thus that the preclusion of judicial review in this case should be understood as incorporating an exception for fraud. But this still leaves the issue as one of interpretation and therefore subject to control by statutory provisions. Here Congress' intent to preclude review is sufficiently clear from the language, structure, and background of the statute that it does not lend itself to any such exception. Finally, if Carlin is instead presenting the more extreme argument that Congress acts unconstitutionally by attempting to preclude review of such cases, because that works an unacceptable invasion of inherently judicial powers, we find novelty to be the theory's only merit. The Supreme Court has never limited Congress' powers in this manner, and we think it highly unlikely that it will ever do so.

B.

Carlin also has suggested that his removal was effected by a minority of the Governors, since the votes of those Governors who were motivated at least in part by their desire to further fraudulent activities should be adjudged null and void. He argues that this removal by a minority of the Governors does not comply with the governing statute, *see* 39 U.S.C. § 205(c)(1) (1982), and that this court can review his removal for failure to satisfy that requirement.

We agree that if a minority of current Governors attempted to remove the Postmaster General, their action would be illegal. Indeed, for their illegal attempt they would probably be subject to removal for cause. We need not decide whether the legality of their putative discharge would be reviewable by the courts, however, for that case is not before us. Here there is no question that a majority of the Governors then in office voted to discharge Carlin. What Carlin would put at issue is not their numbers but their motivations. This argument is, therefore, an attempt to clothe in procedural guise a de-

termination that goes to the merits. We cannot take jurisdiction on this basis. *Cf. Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).[5]

Because we have found no grounds on which to review this case, the decision of the district court is

Affirmed.

[5] Carlin also alleges that his removal occurred at a meeting that was held in contravention of established procedures for public notice, public access, and publication of the agenda for the meeting. In addition, the allegations in his complaint might be construed as stating either a contract claim or a tort claim. Since all of these possible claims have the same basis—the alleged illegality of Carlin's dismissal from the position of Postmaster General—and seek essentially the same relief—either reinstatement or a declaration that his removal was illegal—we find that judicial review of all such claims is foreclosed for the reasons we have stated.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5510 September Term, 1986
Civil Action No. 86-01811

Paul N. Carlin,
Appellant

v.

John R. McKean, individually and as a member of the Board of Governors of the U.S. Postal Service, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BORK and STARR, Circuit Judges, and EDWARD D. RE*, Chief Judge, United States Court of International Trade.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment by the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1982).

Per Curiam

For The Court

/s/
George A. Fisher
Clerk

Date: July 17, 1987
Opinion for the Court filed by Circuit Judge Bork.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 17 1986
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5510 **September Term, 1987**
CA-No. 86-1811

Paul N. Carlin

v.

John R. McKean, individually
and as a member of the Board of
Governors of the U.S. Postal
Service, *et al.*

BEFORE: **BORK** and **STARR**, Circuit Judges; **RE***,
Chief Judge, U.S. Court of International
Trade

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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*Sitting by designation pursuant to 28 U.S.C. Section 293(a).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5510 **September Term, 1987**
CA-No. 86-1811

Paul N. Carlin

v.

John R. McKean, individually
and as a member of the Board of
Governors of the U.S. Postal
Service, *et al.*

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges; Re*, Chief Judge, U.S. Court of International Trade

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

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*Sitting by designation pursuant to 28 U.S.C. Section 293(a).
Circuit Judge Robinson did not participate in this order.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL N. CARLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-1811
JOHN R. McKEAN, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This action by Paul N. Carlin, the 66th Postmaster General of the United States, challenges the decision of the Governors of United States Postal Service on January 6, 1986, to remove him from that office. Plaintiff seeks to be "reinstated" as the Postmaster General following the scheduled resignation on August 15, 1986 of the current Postmaster General, Albert V. Casey. On June 30, 1986, we denied plaintiff's application for a temporary restraining order enjoining the defendants from appointing a Postmaster General to succeed Mr. Casey pending a preliminary hearing. The Governors, nonetheless, have agreed not to appoint a new Postmaster General until August 15, 1986. This case now comes before us on defendants' motion to dismiss. Also pending before us is plaintiff's application for a preliminary injunction. Our grant of defendants' motion to dismiss, however, obviates the need for our having to consider plaintiff's motion. In order to enable us to reach a decision before Mr. Casey's resignation, we imposed an expedited brief schedule. Having considered the parties extensive briefs and the entire record

herein, and for the reasons set forth below, we hold that this controversy is not justiciable,[1] and therefore, grant the defendants' motion to dismiss.

Background

On a motion to dismiss, a court must treat the allegations in plaintiff's complaint as true, and resolve all ambiguities in his favor. To do so in the instant case requires us to assume the worst about a number of public officials whose trust and integrity has never otherwise been challenged. Plaintiff's complaint alleges an elaborate scheme of political corruption and illegal kickbacks, the coverup of which plaintiff alleges ultimately forced his "ouster" as Postmaster General.

Plaintiff was appointed to serve as the 66th Postmaster General commencing January 1, 1985. In 1970, Congress enacted the Postal Reorganization Act (Postal Act), Pub. L. No. 91-375, 84 Stat. 719, which created the Postal Service as "an independent establishment of the executive branch of the Government," 39 U.S.C. § 201. By the terms of the Postal Act, the Postmaster General acts as the "chief executive officer of the Postal Service." *Id.* § 203. The Postmaster General is appointed and removed by majority vote of nine Governors, *id.* § 202(c), 205(c)(1), who themselves are appointed by the President with the advice and consent of the Senate. *Id.* § 202(a). The Postmaster General, the Governors, and a Deputy Postmaster General together constitute the Board of Governors. *Id.* The statute provides that the Board shall direct the "exercise of the power of the Postal Service," *id.*, but authorizes delega-

[1] Whether the issue presented is described as a failure to state a claim upon which relief can be granted, or as calling for relief of an injury which we cannot provide (redressibility), or as an invitation to become involved in a political thicket, our holding is the same.

tion of any authority vested in the Board to the Postmaster General. *Id.* § 402.

On January 6, 1986, a majority of the Governors made a decision to remove the plaintiff as Postmaster General. Plaintiff brings this action against the Postal Service and nine individuals; one former and seven incumbent Governors and the Deputy Postmaster General. The one former Governor, Peter E. Voss, served on the Board at the time the decision to remove the plaintiff was made, but has since pled guilty to illegal gratuity and theft charges.[2] It is Voss' involvement in this criminal kickback scheme which plaintiff contends lies at the heart of the Governors' decision to remove him as Postmaster General. Indeed plaintiff alleges that Voss improperly influenced the Governors' decision because the plaintiff resisted Voss' illegal scheme.

Plaintiff alleges that in mid-1984 Voss referred Recognition Equipment, Inc. (REI), a Dallas firm interested in producing multi-line optical readers (MLOCRs),[3] to John R. Gnau Associates, Inc., a public relations firm. REI subsequently hired the firm in the beginning of 1985 to present its proposal to the Postal Service. This arrangement inured to the financial benefit of Voss because he had previously arranged with John R. Gnau, Jr. to receive

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[2]We note that neither Voss nor the Deputy Postmaster General Jackie Strange have the statutory authority to grant the relief the plaintiff requests,and thus are improper defendants. Neither currently serve as a Governor and therefore neither has any role in the appointment or removal of the Postmaster General. *See* 39 U.S.C. § 202(c).

[3]MLOCRs are machines designed to "read" the full address on a piece of mail, assign the appropriate nine digit zip code,and print a corresponding "bar code" on the envelope. They are an advanced version of the single-line optical character readers (SLOCRs) which are not capable of assigning a nine digit zip code to a piece of mail bearing a five digit zip code.

one third of any revenues generated by Voss' business referrals to the firm, as well as a portion of proceeds received pursuant to postal contracts. Yet, the profitability of this deal was threatened within a month of the REI-Gnau agreement because the Postal Service was prepared to issue contracts to firms for SLOCR conversion kits which would transform single-line equipment previously purchased from these companies to multi-line machines, thereby precluding any contract award to REI. According to the plaintiff, however, Voss, in combination with other Governors, right about the same time held a series of secret meetings of the Technology and Development Committee of the Board of Governors which resulted in a "freeze" of Postal Service procurement actions on contracts to develop these conversion kits.

With the support of these other Governors and through subsequent secret meetings Voss continued to advocate the purchase of multi-line equipment, but his efforts were met with resistance from Postmaster General Carlin who challenged these procurement procedures as anticompetitive and favoring a particular supplier. To prevent the plaintiff from standing in the way of a contract award to REI, Voss allegedly combined with other Governors to plot the plaintiff's ouster. An unauthorized Contigency Committee of Voss and another Governor was formed to seek a replacement for the plaintiff. The Committee met secretly. It expended unauthorized Postal Service funds to hire an executive search firm, the director of which, William Spartin, was also the President of Gnau Associates, Inc. Spartin allegedly contacted the President of REI, William Moore, for suggestions for the plaintiff's replacement, who in turn recommended Albert V. Casey. Spartin transmitted Moore's recommendation to the Contingency Committee which adopted the same.

According to plaintiff, on December 5, 1985, the Governors held an unnoticed meeting of the Board of Governors at which the Contingency Committee delivered an oral report critical of the plaintiff. Plaintiff indeed describes the content of the report as including "character assassinations." On January 6, 1986 another unnoticed meeting was held at which the Governors by a vote of 6-0 with one member abstaining and one member absent acted to remove the plaintiff from office.

Plaintiff's complaint sets out three causes of action for which he seeks solely declaratory and injunctive relief. Plaintiff alleges that his removal on January 6, 1986, by the Governors was the culmination of secret meetings and unauthorized actions which violated the Postal Act and the rules and regulations issued thereunder (Count I); that his removal was the result of a conspiracy to further an illegal kickback scheme which violated both the Postal Reorganization Act, the Government in the Sunshine Act and the regulations promulgated under these statutes (Count II); and that certain of the defendants conspired to interfere with the plaintiff's employment relations with the United States (Count III). Plaintiff seeks a declaration that his removal "was unlawful and therefore null and void" and an injunction compelling his reinstatement as Postmaster General.

Discussion

The gravamen of plaintiff's complaint is that the Governor's decision to remove plaintiff was substantively and procedurally wrong for one or all of three specific reasons: (1) information Voss and others provided the Governors and upon which their decision was based was false; (2) their decision was part of a conspiracy to further an illegal kickback scheme; or (3) their decision was reached via improp-

er procedures.[4] In their motion to dismiss, however, defendants contend that there is no place for judicial inquiry or judicial redress in the removal of an inferior officer within the meaning of Article II, § 2, cl. 2 by his appointing officer where Congress has not so provided. In thus seeking review of the Governors' decision, in the absence of any statutory language authorizing such review, this action raises a threshold question of justiciability.[5]

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[4]In the wake of our denial of plaintiff's application for a TRO, plaintiff appears in his opposition to have "reworked" some of his claims for recovery, and indeed, stretched the allegations of his complaint to create new claims. For example, plaintiff in his opposition attempts to transform his third cause of action for tortious interference with his employment relationship into an action for fraud and duress. His preference for the latter theory is obvious: the remedy for tortious interference is money damages whereas he claims that redress for fraud and duress is a declaration that his resignation is void. As a contract claim, plaintiff has failed in his complaint to allege an essential element of this cause of action — the existence of an employment contract — as well as the jurisdiction of this court under the Tucker Act. To the extent this cause of action sounds in tort, plaintiff has likewise not brought this action under the Federal Torts Claims Act, the only waiver of sovereign immunity by the government for such suits. Even were we to find that plaintiff sufficiently set forth such causes of action, we would nonetheless conclude for the reasons set forth below that they are not justiciable.

Plaintiff in his opposition also attempts to construct from the allegations in his complaint a constitutional theory of recovery: deprivation of his due process liberty interests under the Fifth Amendment. Plaintiff's complaint, however, does not allege facts sufficient to make out such a claim. It is now well-established law that a plaintiff's liberty interest is not implicated by injury to reputation alone. *See* Doe v. United States Department of Justice, 753 F.2d 1092, 1104-12 (D.C. Cir. 1985). Moreover, even if the requisite injury were alleged, the remedy is a "name-clearing" hearing, *id.*, not reinstatement.

[5]Defendant also raises another challenge to the exercise of this court's jurisdiction in asserting that plaintiff lacks standing. However, "a determination of whether the district court had authority to entertain plaintiffs' claim should precede the question of plaintiffs' standing to bring suit." People's Gas, Light and Coke Co., v. United States Postal Service, 658 F.2d 1182, 1188 n.3 (7th Cir. 1981). Because we conclude that plain-

In deciding whether a claim is justiciable, "a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.' " *Powell v. McCormack,* 395 U.S. 486, 517 (1969) (*quoting Baker v. Carr,* 369 U.S. 186 (1962)). We find that plaintiff's substantive challenges to the Governors' decision must fail because there is no statutory or constitutional standard with which this court can evaluate their reasons for removing the plaintiff and that plaintiff's procedural challenges must fail because we cannot compel the relief which he contends is due.

A. Substantive Challenges

We begin with plaintiff's substantive challenges to his removal. Plaintiff contends in his complaint that the Governors lacked "informed consent" when they voted to remove him because Voss and others provided the Governors with "fraudulent information" and "undert[ook] a conscious campaign to disparage plaintiff's reputation and discredit plaintiff's conduct." In addition to this claim which amounts to a charge of ignorance or mistake on the part of the Governors, plaintiff alleges that what motivated the Governors' decision to remove him was their corruption and dishonesty. The short answer to these contentions is that although we might hope with plaintiff that the Governors would make informed, honest decisions, they

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tiff's removal is not subject to judicial review, we need not reach the questions of plaintiff's standing. We note, however, that defendants characterize their challenge to this court's power to review plaintiff's removal in terms of plaintiff's failure to state a claim upon which relief can be granted. Dismissal onthese grounds is aj udgment on the merits. 2A J. Moore, Moore's Federal Practice § 12.02 (2.-5) (2d ed. 1985). We consider defendants' challenge, however, more in the nature of a threshold challenge to whether the suit raises issues amenable to judicial resolution.

are neither constitutionally nor statutorily bound to do so. The ensuing discussion explains this conclusion.

Article II, § 2, cl. 2 authorizes Congress by law to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Plaintiff wisely does not contest that the Postmaster General is an "inferior officer" within the meaning of this clause, whose appointment and removal is vested in the Governors of the Postal Service. It is well-established that when Congress creates an inferior office and vests the power of appointment in the head of a department "it may limit and restrict the power of removal as it deems best for the public interest," *United States v. Perkins,* 116 U.S. 483, 485 (1886), and whether Congress has done so "is determined by meaning and intention of the statute" creating the office. *Id.* Where Congress is silent, however, it is the "general and longstanding rule . . . that . . . the power of removal presumptively is incident to the power of appointment" and may be exercised "at the will of the appointing officer." *Kalaris v. Donovan,* 697 F.2d 376, 389 (D.C. Cir.), *cert. denied,* 462 U.S. 1119 (1983); *National Treasury Employees Union v. Reagan,* 663 F.2d 239, 247 (D.C. Cir. 1981). Thus, "in the absence of a congressional statement to the contrary, inferior officers . . . serve indefinite terms at the discretion of their appointing officers." *Kalaris v. Donovan,* 697 F.2d 376, 397 (D.C. Cir.), *cert. denied,* 462 U.S. 1119 (1983).

39 U.S.C. § 202(c) provides: "The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors." In vesting the Governors with the power of appointment and removal of the Postmaster General, Congress thus placed *no* limitations on this power in the Postal Act other

than the requirement that such a decision be reached by "a favorable vote of an absolute majority of the Governors in office." 39 U.S.C. § 205(c)(1). This procedural limitation clearly cannot be construed to constrain the *substance* of the Governors' discretion. Indeed, when in the same section of the Act, Congress explicitly limited removal of the Governors "only for cause," 39 U.S.C. § 202(a), but did not so limit the removal of the Postmaster General, there can be no question that Congress understood the distinction and "intended what it enacted." *U.S. Railroad Retirement Board v. Fritz,* 449 U.S. 166, 179 (1980).

Thus, the Governors have unfettered authority to remove the Postmaster General on the basis of any or no information and for a good reason, bad reason or no reason at all. In failing to discuss in his opposition the informed consent claim raised his complaint, plaintiff seems to impliedly concede that the Governor breached no duty in relying on alleged falsehoods about his performance. Yet, plaintiff continues to emphasize that the Governors could not remove the plaintiff in furtherance of an illegal kickback scheme. Plaintiff essentially asserts that the court must imply from the statute a standard of good faith. Yet the presumption is to the contrary in favor of "at will" employment. Thus in the landmark case in which this presumption was established, *In re Hennen,* 38 U.S. 230, 260 (1839), the Supreme Court held that it had no power to review or redress the grounds for removal of a district court clerk by the court in whom Congress had vested the exclusive power of appointment, even "[i]f the judge is chargeable with any abuse of his power . . ." [6] Plaintiff's

[6] We find plaintiff's attempts to distinguish *In re Hennen* on its facts entirely unpersuasive, especially in view of the court's express holding that a court has no power to review the facts and circumstances of the removal of an at-will employee. We also find especially peculiar plain-

position that the Governors can remove the Postmaster General for no reason, but not a bad reason has no support in the law.

In understandable frustration, plaintiff retorts that such a rule puts the Governors above the law and proffers another well-established presumption favoring judicial oversight of administrative activities. In support of this contention that agency discretion is reviewable, plaintiff cites *Peoples Gas, Light and Coke Co. v. U.S. Postal Service,* 658 F.2d 1182 (7th Cir. 1981) and *National Association of Postal Supervisors v. U.S. Postal Service,* 602 F.2d 420 (D.C. Cir. 1979) as the governing law of this case.[7] Plaintiff's reliance on this authority, however, is misplaced; indeed, these decisions support rather than refute our holding that this action is not justiciable. Both courts fully

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tiff's attempt to distinguish *In re Hennen* on the ground that the Governors do not exercise powers equivalent to the Postmaster General and therefore "in the constitutional sense, the Governors cannot be considered 'Heads of Departments' or superior to the Postmaster General." The determination of the nature of the discretion of appointing officers, however, is a matter of statutory interpretation, not a functional analysis of the powers exercised by the appointing authority as compared with the appointee. Plaintiff's argument only makes sense if he means to mount a constitutional challenge to the Postal Act's vesting in the Governors the power of appointment because they are not "Heads of Departments" within the meaning of Article II, § 2, cl. 2. We do not understand plaintiff to make such a claim in this action nor has he sought as relief a declaration of the unconstitutionality of this provision of the Act.

[7]Plaintiff, however, fails to reconcile the different analytic approaches of these two courts. In *Peoples Gas,* the court considered the question whether the court had subject matter jurisdiction to review a procurement decision that was being challenged. 658 F.2d at 1188-92. In *Postal Supervisors,* however, the court concluded that the Postal Act provided the court with jurisdiction to hear plaintiff's challenge to a salary decision and then considered the question whether Congress should nonetheless intended to foreclose judicial review of discretionary action. 602 F.2d at 428-32.

recognize that this presumption of judicial review is rebuttable. As stated by the Court of Appeals for this Circuit:

> [T]he presumption can be overcome by evidence of legislative intent to foreclose judicial intervention, . . . or a finding that the issues involved are unsuitable for judicial determination owing to the character of the discretion delegated to the administrative agency.

602 F.2d at 429 (citations omitted). In the instant case, it was the very intent of Congress in the Postal Act to leave the Governors' discretion to remove the Postmaster General so entirely unrestricted as to foreclose judicially discoverable and manageable standards, and indeed, preclude judicial review. Thus, the Seventh Circuit's holding in *Peoples Gas* that it can review the manner in which the Postal Service reached its decision to specify an electrically-powered heating facility for the Chicago Main Post Office is conditioned on the court having found that "the Postal Service's discretion to make that decision was not unbounded but was subject to certain guidelines contained in its regulations." 658 F.2d at 1192. Whereas in *Peoples Gas* "there is a law to apply," *id.* at 1190, plaintiff can point to no such substantive guidelines in the Postal Act.[8] The D.C. Circuit's decision is likewise distin-

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[8]Plaintiff in his opposition does argue that in interfering with the Postmaster General's honest, efficient, and economical direction and management of the Postal Service, the Governors violated 39 C.F.R. § 1.2, which provides in part:

> The Board of Governors of the Postal Service (the Board) directs the exercise of its powers under management that is expected to be honest, efficient, and economical.

Plaintiff makes the wrong argument. Rather, plaintiff should argue that this regulation just as the regulation in *Peoples Gas,* supplants a standardless statute concerning removal with substantive principles which must be applied in the exercise of the delegated discretion. Although such

guishable.[9] In *Postal Supervisors,* the court evaluated the Postal Service's discretion in setting compensation levels of postal supervisors according to "congressional directives setting the limits on that discretion." 602 F.2d at 432. There are simply no such congressional directives in the Postal Act concerning the removal of the Postmaster General.

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an argument is more responsive to the issue of reviewability before the court, we are nonetheless unpersuaded by it. Plaintiff points to no provision in the statute wherein Congress permitted the Postal Service to promulgate a rule with the participation of the Postmaster General to alter the power of the Governors to appoint and remove the Postmaster General. Indeed the language of the statute would seem to evidence a contrary intent in authorizing the *Board* of Governors to delegate their authority "[e]xcept for those powers, duties or obligations specifically vested in the Governors." Even § 1.2 refers just to the power of the *Board* and delineates those powers as follows.

> The Board directs and controls the expenditures of the Postal Service, reviews its practices and policies, and establishes basic objectives and long-range goals in consonance with the provisions of the Postal Reorganization.

The Governors' power of appointment is conspicuously absent from this section. Likewise § 3.5 provides:

> [T]hese bylaws delegate to the Postmaster General the authority to exercise the powers of the Postal Service to the extent that this delegation of authority does not conflict with powers reserved to the Governors . . . by law.

Even if we were to accept the argument that § 1.2 provides sufficient standards to enable us to review the substance of the decisions of the Governors to remove plaintiff, we nonetheless would find this action nonjusticiable, as we discuss below, because of our inability to judicially mold the protection of this right plaintiff seeks.

[9]Plaintiff's reliance on Associated Third Class Mail Users v. U.S. Postal Service, 405 F. Supp. 1109 (D.D.C. 1975), *aff'd.,* 569 F.2d 570 (D.C. Cir. 1976), *vacated,* 434 U.S. 884 (1977), *vacating district court judgment,* 662 F.2d 767 (1980), is similarly misplaced. Not only does plaintiff erroneously argue that a vacated judgment has precedential effect, but plaintiff also overlooks the court's emphasis on the express provision in the Postal Act limiting the Board of Governors' discretion in setting postal rates. 405 F. Supp. at 1113-15.

B. Procedural Challenges

Plaintiff's procedural challenges to his removal do not aid his cause. In the instant case, plaintiff relies on provisions of the Government in the Sunshine Act, 5 U.S.C. § 552b, as well as a number of closely related regulatory provisions promulgated under the Postal Act.[10] The relief plaintiff seeks for these violations, however, is a declaration that the substantive actions taken pursuant to these improper procedures are null and void and of no effect. Among the actions plaintiff seeks in effect to have "erased" is the vote of the Postal Governors removing him as Postmaster General, which according to plaintiff occurred at a meeting for which no advance agenda was set, which was not noticed, and which, being unknown, was effectively closed, thereby violating 39 C.F.R. §§ 5.1, 7.2, 7.4, 7.5. Plaintiff himself admits to the weakness of this position in acknowledging that "the Sunshine Act is not the sole or even the principal basis of plaintiff's complaint." P.1. Opp. at 10.[11] Moreover, " 'release of transcripts, not invalidation of the agency's substantive action,' is the remedy generally appropriate for disregard of the Sunshine Act." *Braniff Master Executive Council v. C.A.B.*, 693 F.2d 220, 226 (D.C. Cir. 1982). The dispositive flaw in plaintiff's theory, however, is that we do not have the power to compel the appointment of the plaintiff as Postmaster General. That power is vested by Congress in the Governors of the Postal Service.

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[10] See, e.g. 39 C.F.R. §§ 1.4 (open meetings), 3.4 (expenditures of funds), 5.1 (establishment of committees), 7.2 (open meetings), 7.4 (closed meetings), 7.5 (public notice of meetings).

[11] Even if plaintiff could show that the Board of Governors took action at meetings not in compliance with the Sunshine Act, he would have no right to overturn such action: 5 U.S.C. § 552b(h)(2). We need not reach defendants' argument that plaintiff's Sunshine Act claims are time-barred.

Plaintiff nonetheless cites *Powell v. McCormack*, 395 U.S. 486 (1969), as an instance where the Supreme Court was willing to declare that Adam Clayton Powell had a right to take his seat in the House of Representatives, even though the House has the authority to determine the qualifications of its members. Unlike the instant case, however, it was undisputed in that case that Powell met those requirements, and only for that reason did the House have a duty to seat him. *Id.* at 517. Moreover, the court did not reach the very critical issue presented in this case "about the appropriateness of coercive relief" because the petitioners sought only a declaratory judgment. *Id.*

Plaintiff accordingly attempts to fudge the nature of the injunctive relief he seeks by asserting that he merely calls on the court to declare his removal null and void and of no effect and to enjoin the Governors from interferring with his "resuming" his duties as Postmaster General. He in effect asks the court to try his title to office. The nature of the extraordinary relief the plaintiff seeks is not altered by his offer to wait for Mr. Casey to resign before resuming office. To declare that plaintiff never ceased being Postmaster General is in the same breath to declare that Mr. Casey is unlawfully exercising the powers of that office. That plaintiff is willing not to contest Mr. Casey's unauthorized tenure for only a few more weeks does *not* avoid "questions that might exist if Mr. Casey were not scheduled soon to leave the Postal Service." Pl. Opp. at 32.

Conclusion

In enacting the Postal Act and explicitly vesting therein the *unrestricted* power of appointment and removal of the Postmaster General in the Governors of the Postal Service, Congress deprived the courts of judicially manage-

able standards by which to review a removal decision by the Governors and intentionally foreclosed the courts from redressing any such removal. We thus hold that plaintiff's suit is not justiciable, and grant defendants' motion to dismiss.

An order consistent with the foregoing has been entered this day.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

Date: 18 July 86

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL N. CARLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-1811
JOHN R. McKEAN, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the defendants' motion to dismiss, the parties supplemental pleadings thereto and the entire record herein, and in accordance with the Memorandum Opinion issued this day, it is by the court this 18th day of July, 1986,

ORDERED that defendants' motion to dismiss is granted, and it is

FURTHER ORDERED that this action is dismissed.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

FILED
JUL 18 1986
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

APPENDIX G

Section 202(c) of the Postal Reorganization Act (39 U.S.C. 202(c)):

§ 202. Board of Governors

* * *

(c) The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors.

Section 205(c) of the Postal Reorganization Act (39 U.S.C. 206(c)):

§ 205. Procedures of the Board of Governors

* * *

(c) The Board shall act upon majority vote of those members who are present, and any 6 members present shall constitute a quorum for the transaction of business by the Board, except —

(1) that in the appointment or removal of the Postmaster General, and in setting the compensation of the Postmaster General and Deputy Postmaster General, a favorable vote of an absolute majority of the Governors in office shall be required[.]

Section 208(a) of the Criminal Code (18 U.S.C. 208(a)):

§ 208. Acts Affecting a Personal Interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director,

officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowlege, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest –

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 1905 of the Criminal Code (18 U.S.C. 1905):

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or ofifical duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or associatin; or

permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Section 201(c) of Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees":

Part II – Standards of Conduct

Sections 201(c) and 205.

* * *

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of –

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

Sect. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Criminal Case
v.	:	No. 86-0195
	:	(J. Revercomb)
PETER E. VOSS	:	

GOVERNMENT MEMORANDUM IN AID OF SENTENCING

The United States, through its counsel, the United States Attorney for the District of Columbia, in order to apprise the Court more fully of the operative facts underlying the charged offenses in this case, submits the following memorandum.[1]

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[1]A sentencing judge may consider a wide variety of information as to a defendant's background, character, and conduct, criminal and otherwise, in imposing a sentence. The Supreme Court has consistently held that even acts and conduct *not* resulting in convictions may properly be considered. *See Williams v. New York*, 337 U.C. 241, 246-247 (1948) (It was proper for the trial judge to have considered evidence of 30 other burglaries *believed* to have committed by the defendant, as well as the probation report ***);*Williams v. Oklahoma*, 358 U.S. 576 (1959) (The sentencing judge may consider hearsay information which is relevant to the crime and the defendant's life); *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972) (The sentence was affirmed where it was based on information not contained in the presentence report which included evidence of offenses for which the defendant was acquitted.)

See also 18 U.S.C. § 3577 – 'No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

On May 30, 1986, Mr. Voss entered pleas of guilty to three separate felony charges: agreeing to accept a gratuity and accepting a gratuity (both in violation of 18 U.S.C § 201(g) and each carrying a penalty of not more than two years incarceration or not more than a $10,000 fine or both) and embezzlement of Postal Service property (in violation of 18 U.S.C. § 1707, carrying a penalty of not more than 3 years incarceration or not more than a $1,000 fine, or both.

The United States recommends to this Court that the sentence in this case must take cognizance of the serious facts underlying the crimes committed by Mr. Voss, Mr. Voss' early willingness to plead guilty and his early, valuable assistance to the government's ongoing investigation.

THE FACTS[2]

In July of 1982, Peter E. Voss was appointed to be a member of the Board of Governors of the U.S. Postal Service (hereinafter USPS). Following his appointment to the Board, Mr. Voss participated in two illegal schemes to enrich himself. One scheme involved the agreement to receive and receipt of sums of money as a result of the use of his official position for his personal financial benefit and as a result of his corrupted advocacy in a particular USPS contract procurement action.[3] The other scheme involved the defendant's obtaining money from the U.S. Postal Service through submission of false and fraudulent expense vouchers.[4]

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[2]Beyond the facts contained in factual Foundation Supporting Guilty Pleas filed at the time of the pleas in this case, the additional facts set forth in this document are a combination of facts derived from extensive document analysis, dozens of interviews and sworn statements of several key participants including Voss in the events of this case.

[3]This scheme provides the basis for the offenses of agreeing to accept and accepting illegal gratuities.

[4]This second scheme provides the basis for the offense of embezzlement of Postal Service property.

Concerning the travel voucher fraud involving the embezzlement of Postal Service property, beginning almost immediately with his second Board of Governor's meeting in September of 1982, defendant Peter E. Voss fraudulently purchased first class airline tickets for the same dates as legitimate USPS related travel. (As a member of the USPS Board of Governors, the defendant was permitted to fly first class.) Mr. Voss would charge a first class ticket on his credit card account and then book coach class tickets, frequently in the false names of Peter Williams and Dick Fredericks. He would then photocopy the first class ticket and return the original to the airline for credit to his charge account. Mr. Voss would later travel on the coach class ticket, but submit the photocopied first class ticket or invoice to the USPS for reimbursement.[5] U.S. Postal Inspectors have compared the coach class tickets actually utilized by the defendant with the travel expense vouchers submitted by him between September of 1982 and April of 1986. For the eighty-one instances found thus far in which Mr. Voss traveled on USPS business and submitted false and inflated claims, 55 of which included fraudulent departure or destination cities, he received reimbursements of $70,022.51, when his actual expenditure was only

[5] To increase the proceeds of this scheme, Voss would purchase first class tickets to and from departure destination points other than Cleveland (his usual departure/destination point). These fraudulent department destination points included West Palm Beach, Denver, El Paso, Houston, San Antonio, Dallas, Albuquerque, Seattle, Salt Lake City, Wichita, Minneapolis, and San Francisco. The first class airfare to and from these destinations was greater (in some instances, much greater) than the first class airfare to and from Cleveland. For example, in the fraudulent submission to which Voss pleaded guilty, Voss claimed round trip first class airfare ($1,398.00) from San Francisco, to Washington, D.C. when in fact he flew round trip coach ($218) from Cleveland, to Washington, D.C. By claiming a fraudulent destination, Voss fraudulently netted $1,180.00.

$26,204.54. Thus, the amount embezzled by the defendant is $43,817.97.

Pertaining to the scheme to misuse his official position for his own financial benefit, which culminated in the corruption of a large U.S. Postal Service automated mail-sorting equipment procurement, the thorough investigation done by the United States Postal Inspection Service in this case has uncovered the fact that Peter E. Voss had misused his position on at least four earlier instances of Postal Service business. He conceived of a scheme to use inside information and documents, in return for money, to enable John R. Gnau, Jr., and his company Gnau & Associates, Inc., to obtain consulting contracts with potential postal vendors. Starting in late 1983, defendant Voss began exchanging the use of his official influence and position to benefit Gnau in exchange for the prospect of personal financial gain. Voss reached an agreement with Gnau's company to be paid a thirty percent referral fee, and this agreement eventually covered Voss using his official position to benefit Gnau's business dealings with:

(1) a Delaware corporation, headquartered in Santa Monica, California, which owned a large parcel of real estate in Chicago which it attempted to sell to the Postal Service,

(2) a national real estate brokerage firm which sought to obtain a contract with the Postal Service to determine the highest and best utilization of its most valuable real estate holdings,

(3) an Ohio corporation which sought a Postal Service research and development contract on automated warehouse and material handling, and

(4) an Ohio corporation which sought a Postal Service timekeeping equipment contract.

Voss in fact received $6,000.00 pertaining to the third item listed above, starting in early September 1984, at the same time that he was setting into motion the corruption of a massive Postal Service automated mail-sorting equipment procurement. Voss' scheme to misuse his official position finally centered upon the Postal Service procurement and controversy concerning the feasibility of using single line optical character readers (hereinafter sometimes referred to as "SLOCR's") for sorting mail.[6]

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[6]The U.S. Postal Service (herinafter "USPS") has contracted over the years for the purchase of single line optical character readers. These machines are designed to "read" city, state and zip code (five or nine digit) on a piece of mail and print a corresponding "bar code" on the envelope. The piece of mail can then be sorted with a minimum of manual handling. The USPS sought to expand the zip code from five to nine digits so that the mails could be sorted and processed much more efficiently by the SLOCRS. During the later half of 1984, the USPS became concerned with the nine digit zip code usage which was not as high as predicted. When a piece of mail contained a nine digit zipcode, the SLOCRs proved to be many times more cost effective in sorting that zip coded mail than five digit zip coded mail. Since SLOCRs are not capable of assigning a nine digit zip code to a piece of mail bearing a five digit zip code, the USPS began to examine "multiline" technology. Multi-line optical characters readers (hereinafter sometimes referred to as "MLOCRs") would be able to "read" the full address on a piece of mail, assign the appropriate nine digit zip code and print the corresponding "bar code' onto the mail. Multi-line reading is a considerably more expensive and technically difficult approach to applying Zip + 4 bar codes (nine digit zip code) than the "single line" approach. By mid-1984, based on technical federal studies, the recommendation of the General Accounting Office and the support of Congress, the Postal Service had initiated a program to develop and study multi-line read capability for possible future implementation. As part of its program, the USPS was discussing with the original SLOCR equipment manufacturers, Burroughs, Pitney Bowes and ElectroCom Automation (ECA), the development of kits to be retrofitted to the manufacturers' SLOCR equipment, thereby converting it to MLOCR capacity.

It was in the context of this procurement that Peter E. Voss used his inside information to facilitate the next phase of his scheme. On September 3, 1984, Peter E. Voss met with an executive of a Dallas manufacturing corporation which was not involved in supplying the original SLOCR equipment but which was interested in producing MLOCR equipment. The corporation had been a disappointed competitor of ECA on a previous SLOCR procurement, and it had had a history of problems on prior USPS procurements. At that meeting, Peter E. Voss recommended that the corporation hire Gnau and his Detroit public relations firm,[7] to present the corporation's MLOCR proposal to the USPS. During the fall of 1984, a meeting and various telephone calls, including one from Voss to the corporation's president, occurred for the purpose of convincing the corporation that Gnau & Associates would be valuable in the corporation's plans to obtain a postal MLOCR contract. As part of their general plan to obtain business and money for themselves by manipulating Postal Service business, Voss arranged for the incoming Postmaster General (hereinafter "PMG") Paul N. Carlin to listen in on a staged telephone conversation between Voss and Gnau which Carlin believed was spontaneous. Unknown to Carlin, the conversation, wherein Gnau described how he had helped to obtain White House approval for Carlin's appointment, was staged for the purpose of making Carlin feel indebted to Gnau.[8]

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[7] During late 1984, Voss was introduced by John R. Gnau, Jr., to William A. Spartin, who was at the time President of Gnau & Associates, Inc. and President of MSL Incorporated. Voss had earlier been introduced to Michael Marcus, Vice-President and Treasurer of Gnau & Associates, Inc.

[8] Voss, a member of the Board of Governors Contingency Committee, was instrumental in Carlin's selection as the new PMG and also other top Postal Service officials who were later to feel the attempted influence of Voss in their official acts.

Beginning in January of 1985, Peter Voss arranged for Messrs. Gnau and Marcus to meet with the Postmaster General, Board of Governors and various officials of the USPS to discuss the corporation's multiline optical character reader equipment. In particular, Gnau and Marcus were able to meet with the new PMG on January 11, 1985, just a few days after he took office, believing he would be favorably disposed to their discussions about Postal Service real estate holdings, automated warehousing and optical character readers. Contemporaneously Gnau & Associates concluded negotiations with the corporation resulting in a contract to assist the Dallas company in pursuing the multi-line optical character reader contract with the USPS. Under the terms of the contract, the corporation would pay a $30,000 fee to Gnau & Associates in three equal installments, reimburse expenses incurred and pay a fee of one percent of the finalized contract price. Voss, Marcus, Gnau and Spartin decided that the fee would be divided equally among themselves. (The contract value for the multi-line optical character readers was estimated to be in the range of $250-400 million dollars.[9]) The corporation began payment to Gnau & Associates under the terms of the contract in January of 1985. Gnau & Associates then issued checks to Decision Systems Incorporated, one of the defendant's companies. Between February 5, 1985 and May 10, 1985, defendant Voss received $9,000.00.

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[9]The total life cycle cost for this procurement is estimated to be in the range of eight billion dollars. Total life cycle cost is calculated by adding the ten year net present value of the total operating cost (assuming a 6% inflation rate and a 10.5% discount rate) to the year zero cost. The year zero cost equals the loaded unit price (bid price plus initial maintenance cost) modified for through put. Based on the test data, the total operating cost equals cost of processing 1000 pieces of mail X 264,000 pieces per day X 286 days per year, plus maintenance cost (preventive and corrective labor, spare parts and training).

On March 5, 1985, Peter Voss, along with another member of the Board of Governors, but without the required participation or knowledge of the full Board, persuaded the Chairman of the Board of Governors that USPS management be directed to cease immediately all activity related to the conversion kit procurement. This action was necessary to the ultimate goals of the defendant's scheme because it provided the groundwork for the immediate opportunity for the Dallas company to be considered for any further USPS OCR procurements.

On May 10, 1985, the defendant, Gnau and Spartin met in Bloomfield Hills, Michigan and discussed, among other things, the distribution of the fee to be received by Gnau Associates from the corporation related to the pending USPS procurement.

From May through July of 1985, the defendant encouraged, recommended to and instructed Deputy Postmaster General Jackie Strange that the USPS should purchase the MLOCR system, on a non-competitive basis, from the corporation. Additionally, Mr. Voss caused the Deputy Postmaster General to prepare a decision analysis supporting these recommendations and to make an effort to bypass the established review/approval process. Although he was unsuccessful in obtaining a noncompetitive award to the corporation, he had set events into motion which resulted on August 5, 1985, in USPS management recommending, and the Board of Governors agreeing, that the USPS would commence a two-part competitive MLOCR procurement. Soon thereafter two corporations, including Gnau's client corporation, signed competitive test agreements pertaining to MLOCR equipment. Thus, with Voss' assistance, the corporation's competitive situation improved from its pre-March 5, 1985, status of not being eligible for any open Postal Service OCR procurement to

its post-August 5, 1985, status of being fully eligible to win a MLOCR contract with its MLOCR equipment and technology which were ahead of that of its competitors. Bowing to Voss' persuasion, USPS Management decided not to award any research and development money on this procurement. This was a decided disadvantage to the corporation's competitors since the corporation had had fifty million dollars of USPS research and development money at its disposal during previous years for multi-line technology. Despite the fact that the USPS had signed an agreement with two vendors including the Dallas corporation to competitively test their multi-line optical character reader systems, the defendant continued to press for an immediate non-competitive contract award to the corporation during the fall of 1985.

In June of 1985, Messrs. Gnau and Marcus delivered an agreement to Mr. Spartin's office setting up procedures for dividing the one percent bonus payment to be received upon contract award. Mr. Spartin discussed the agreement with defendant Voss. The defendant explained that Marcus told him he prepared the agreement because of doubts that Gnau would actually disburse the funds after receipt from the corporation. Spartin indicated that documents of the nature of the agreement were dangerous and could implicate the parties. Nevertheless, in September of 1985, Gnau and Marcus delivered to Spartin a revised agreement to divide the proceeds among the participants. Around the same time, the corporation amended and expanded its agreement with Gnau Associates resulting in monthly payments to Gnau Associates in the amount of $22,000.00 a month, beginning in October of 1985.[10] When the defen-

[10]From October of 1985 to April of 1986, Voss arranged with Spartin to receive free airline tickets in the name of B. Spartin. The airline reservations were made by defendant Voss but paid for by Mr. Spartin or Spar-

dant learned of the amended agreement between the corporation and Gnau Associates, he had a number of conversations with Marcus, Gnau and Spartin complaining about not receiving his share of the new revenues. Thereafter, Mr. Voss received four payments from Gnau between November of 1985 and February of 1986. Each payment was $2,500.00 in cash received personally from Gnau on two occasions and from Gnau via air courier express on two other occasions.

The total amount of money and property received by Peter Voss to date under the above-described scheme is approximately $30,000.

LOSS TO THE POSTAL SERVICE

Peter Voss' advocacy of the corporation's pursuit of a $250-400 million contract has had a significant, measurable and adverse impact on the U.S. Postal Service. Postal officials made decisions based on Voss' anticipated reaction and not in the best interests of the Postal Service or the public. Management's unprecedented decision not to fund the competitive test agreements is a perfect example. This decision favored the Dallas corporation because it had already received fifty million dollars in development funding. Management, lacking the power to oppose Mr. Voss and fearful of incurring his wrath by expending additional developmental funds, invited vendors to participate in a test of equipment developed at their own expense with no guarantee any sales would result. This was a reversal of normal postal procurement practice and a major factor in Pitney Bowes and Burroughs deciding not to participate in

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tin's office. These tickets, totalling approximately $4500, were payments to Voss for his efforts in obtaining recruiting contracts for Spartin with the Postal Service and the Board of Governors, which are discussed, *infra*.

the test. Voss had eliminated two of the corporation's three competitors, and anything good for the corporation was good for Voss.

Peter Voss' greed and personal ambition set in motion a course of events which culminated in a scandal within the Postal Service of the greatest proportions. Voss had maneuvered William Spartin into a position of respect with the highest officials of the Postal Service. Voss introduced Spartin to then Postmaster General Paul Carlin who utilized Spartin to recruit high level officials. Voss encouraged meetings between Spartin and Deputy Postmaster General Jackie Strange, which enabled Spartin to gain valuable insight into various management procedures and initiatives. Voss introduced Spartin to Board of Governors Chairman John McKean who periodically sought Spartin's counsel of personal matters and ultimately hired Spartin to recruit a new Postmaster General to take the place of PMG Carlin who was an obstacle to the sole source award to the Dallas corporation. Of course, Voss failed to disclose to Carlin, Strange or McKean that Spartin was President of Gnau and Associates, Inc., a consultant for the Dallas Corporation on the MLOCR procurement with a substantial personal financial stake in the outcome of the MLOCR procurement.[11]

The direct cost to the Postal Service of Peter Voss' activities over and above the amount he embezzled are dif-

[11]On or about March 3, 1986, the remaining Postal Governors learned that William A. Spartin was both the president of MSL and GAI. In a specially convened Board of Governors meeting wherein the Governors discussed William Spartin's apparent conflict of interest as it related to the recruitment of an interim and permanent PMG, and deliberated whether any corrective action was necessary, Peter Voss denied any knowledge of Spartin's relationship with REI and GAI. Furthermore, Voss told the remaining Governors that after referring representatives of GAI to PMG Carlin he had no contact with GAI.

ficult to quantify. Without his corrupt influence, the Postal Service would have undoubtedly invested significant resources to ensure a fair procurement decision. The real damage, however, is that Voss' direct corrupt acts caused a freeze and cancellation of the Postal Service's program to develop multi-line capability for single line equipment while, at the same time, his corrupt acts have also resulted in the automation program being frozen while investigations are conducted and associated problems are resolved to be sure the procurement action can proceed with the least possible effect of Voss' corrupt influence. Succinctly stated, in an age of automation, Voss will have caused an estimated two-year delay in automation at the Postal Service.

While Peter Voss was actively campaigning for the Dallas corporation, he claimed the Postal Service was losing $1.2 to $2 million in productivity for each day the MLOCR deployment was delayed. Postal managers disputed these figures but said the amount may have been as much as hundreds of thousands of dollars per day. The program was put on hold on June 6, 1986. The earliest the automation program can resume is January 19, 1987. Accordingly, the 227-day delay will have caused the Postal Service to forego savings of millions of dollars. These enormous costs are real and directly attributable to the corrupt acts of Peter Voss and his associates. They will utimately be paid by the American public through their postal rates.

Voss must shoulder the responsibility for the results of his activities. He has shaken the morale of postal managers from top to bottom. He has shackled the agency's efforts to modernize its mail processing operation. He has reduced the public's confidence in the USPS's ability to carry out its mandate and manage its business in the na-

tion's best interest. Perhaps most serious of all, he has enhanced public perceptions that appointed government officials put their own interests ahead of all others in executing their sworn duties.

PETER VOSS' COOPERATION

Peter Voss voluntarily related his crimes to Postal Inspectors and federal prosecutors on May 9, 1986. During extensive interviews since that date, he has outlined the role of other individuals in this conspiracy to influence postal procurements.[12] The government recognizes the significant value to its investigation of Voss' prompt admissions and guilty pleas to three felony counts on May 30, 1986. His timely admissions have benefited the investigation by substantiating previously developed information and assisting in determining the validity of information provided by other witnesses and potential defendants. Voss also added to the body of knowledge the United States possessed about this scheme. In fact, it is probable that Voss' plea and admissions assisted the government in obtaining at least one plea and significant cooperation from other defendant(s) and witnesses.

Voss resigned his position on the USPS Board of Governors effective May 30, 1986, thereby enabling the Postal Service to launch a review of its recent procurement history to remove any taint remaining from Voss' involvement. By removing himself from the process, Peter Voss has aided the Postal Service's efforts to have a fair and impartial procurement.

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[12]In fact, Peter Voss and his attorneys requested an opportunity to speak with Postal Inspectors 10-15 days prior to May 9. The interview was delayed at the request of the government so investigative leads relating to Voss' criminal activities could be explored.

Respectfully submitted,

JOSEPH E. DIGENOVA
United States Attorney
for the District of Columbia

Stephen R. Spivack
Assistant United States Attorney

E. Lawrence Barcella, Jr.
Special Assistant U.S. Attorney

Joseph B. Valder
Assistant United States Attorney
(202) 272-9019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been mailed, postage prepaid, to N. Richard Janis, Esquire, and Lawrence H. Wechsler, Esquire, at Janis, Schuelke & Wechsler, 1728 Massachusetts Avenue, N.W., Washington, D.C. 20036, this _____ day of _____, 1986.

Joseph B. Valder
Assistant United States Attorney
(202) 272-9019

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Criminal No. _____
	:	Violations: 18 U.S.C.
v.	:	§§ 371, 201(f), 2
	:	(Conspiracy, Paying
JOHN R. GNAU, JR.	:	an Illegal Gratuity,
	:	Aiding & Abetting)

INFORMATION

The United States Attorney respectfully informs the Court that:

COUNT ONE

1. At all times material herein, the United States Postal Service (hereinafter sometimes referred to as "Postal Service" or "USPS") was an agency and independent establishment of the executive branch of the government of the United States among whose official functions was to accept and deliver articles placed in the United States mail system.

2. At all times material herein, the Board of Governors of the United States Postal Service had the power (1) to direct and control the expenditures and review the practices and policies of the Postal Service and (2) to appoint and remove the Postmaster General.

3. At all times material herein, Peter E. Voss, an unindicted coconspirator, was

(a) a member of the Board of Governors of the United States Postal Service, eventually becoming (1) a

member of the Board of Governors Technology and Development Committee which was to gather information on behalf of said Board and to assist said Board in considering policies and issues pertaining to the procurement of various types of goods and services including multi-line optical character reading (hereinafter sometimes referred to as "MLOCR") equipment to be used for sorting United States Mail and (2) the Vice-Chairman of said Board of Governors and,

(b) president and owner of Decision Systems, Inc., an Ohio company dealing in consulting and commercial acquisition activities.

4. At all times material herein, defendant JOHN R. GNAU, JR., was associated with and part owner of the following public relations firms: Gnau, Carter, Jacobsen and Associates, Inc.; John R. Gnau, Jr. and Associates, Inc.; and Gnau & Associates, Inc. (hereinafter sometimes collectively referred to as "GAI").

5. At various times material herein Michael B. Marcus was director and treasurer of Gnau, Carter, Jacobsen and Associates, Inc., and director, vice-president and treasurer of Gnau & Associates, Inc. (the identification of this individual should not be understood to indicate any improper or illegal conduct on his part).

6. At various times material herein William A. Spartin was president of Gnau & Associates, Inc., and president and managing director of MSL International Consultants Limited, an executive placement firm (the identification of this individual should not be understood to indicate any improper or illegal conduct on his part).

7. At all times material herein Recognition Equipment, Inc. (hereinafter sometimes referred to as "REI") was a Delaware corporation, headquartered in Dallas, Texas,

engaged in the design, manufacture and distribution of optical character reading equipment (the identification of this business entity should not be understood to indicate any improper or illegal conduct on its part).

8. From in or about December, 1983, the exact date being unknown, and continuing until March, 1986, within the District of Columbia and elsewhere, defendant JOHN R. GNAU, JR., and Peter E. Voss, an unindicted co-conspirator, and others, known and unknown, willfully, unlawfully and knowingly did combine, conspire, confederate and agree together and with others known and unknown to defraud the United States, more particularly the defendants and co-conspirators did combine, conspire, confederate and agree together and with each other to defraud the United States Postal Service and the citizens of the United States of America of their right to the loyal, honest, faithful and disinterested service, action and performance of official duties ~~of its officers~~ and employees free from dishonesty, deceit, corrupt influence and official misconduct, and of their right to fair and unbiased federal goods and services procurements, free from conflict of interest, misrepresentation and unjust influence, in violation of Title 18, U.S. Code, Section 371.

9. It was a part of the conspiracy for defendants JOHN R. GNAU, JR., Peter E.Voss, an unindicted coconspirator, and others, known and unknown, unjustly and illegally to enrich themselves and other businesses, trusts, and corporations which they directed and controlled by receiving and otherwise obtaining illegal monies disguised as consulting and referral fees for and on account of various Postal Service procurements.

MEANS AND METHODS USED IN SEEKING TO ACHIEVE THE OBJECT OF THE CONSPIRACY

10. It was further a part of said conspiracy, in order unjustly and illegally to enrich themselves by circumventing and manipulating the contracting and procurement processes of the United States Postal Service, thereby defrauding that agency, that defendant JOHN R. GNAU, JR., and unindicted coconspirator Peter E. Voss, and others, known and unknown, used the following means and methods, among others, in seeking to achieve their object:

(a) Defendant JOHN R. GNAU, JR., and unindicted coconspirator Peter E. Voss would and did discuss, plan and agree; (1) that they would assist and promote defendant GNAU and GAI in acquiring and obtaining consulting agreements with private business entities, to be determined and identified by Voss, which would seek procurement contracts with the Postal Service; (2) that Voss would circumvent and manipulate the Postal Service's contract and procurement processes to insure the award of such contracts to the private business entities with which defendant GNAU had GAI ahd such consulting agreements; and (3) that defendant GNAU, for Voss' personal financial benefit, would share, as referral fees, with Voss money profits from GNAU and GAI's consulting contracts with such business entities seeking Postal Service contracts in the manner described in this subparagraph.

(b) For the purposes set forth in subparagraph (a) above, defendant JOHN R. GNAU, JR., unindicted coconspirator Peter E. Voss and others would and did: (1) share inside information and internal documents from the Postal Service's procurement meetings and proprietary files and Board of Governors closed board meetings and confidential files, (2) obtain access for defendant GNAU,

and others working with him, to senior, high-level officials of the Postal Service and its Board of Governors, thereby obtaining and attempting to obtain consulting contracts for defendant GNAU and GAI with various business entities seeking postal contracts, and (3) agree that Peter E. Voss would urge the positions of GAI clients in their dealings with the Postal Service.

(c) Defendant JOHN R. GNAU, JR., unindicted coconspirator Peter E. Voss and others would and did attempt to cause and affect the selection, placement and termination of certain high level Postal Service officials, for the purpose of enhancing the successful achievement of the object of their conspiracy.

(d) Defendant JOHN R. GNAU, JR., unindicted coconspirator Peter E. Voss, and others, known and unknown, would and did attempt, illegally and unlawfully, to cause the non-competitive award of a Postal Service contract pertaining to optical character reading equipment to Recognition Equipment, Inc.

(e) Defendant JOHN R. GNAU, JR., unindicted coconspirator Peter E. Voss and others, known and unknown, would and did hide and conceal from the Postal Service and the public the true nature and full extent of their interlocking personal financial understandings and private business relationships.

OVERT ACTS

11. The defendant JOHN R. GNAU, JR., and unindicted coconspirator Peter E. Voss committed the following overt acts, among others, in furtherance of their conspiracy:

1. In or about December, 1983, the exact date being unknown, defendant GNAU and unindicted coconspira-

tor Voss, had a conversation in which they discussed a relationship in which (1) Voss would furnish the names of prospective postal vendors to GAI, (2) Voss would recommend to such prospective postal vendors that they hire GAI as a consultant, (3) GAI would obtain consulting contracts with such prospective postal vendors, and (4) GAI would pay Voss thirty percent of any money received from such prospective postal vendors.

2. On or about December 20, 1983, within the District of Columbia, defendant GNAU received a letter from a corporation, headquartered in California, which was seeking to sell a piece of real estate in Chicago, Illinois, to the Postal Service, confirming their business relationship and fee schedule.

3. On or about June 29, 1984, defendant GNAU spoke to officials of an Ohio corporation which was seeking a Postal Service timekeeping equipment contract concerning GAI's attempt to obtain a consulting contract with the corporation.

4. In or about July of 1984, unindicted coconspirator Voss told an associate to give to GAI a proprietary proposal belonging to a competitor of a national real estate brokerage firm which was seeking a contract with the Postal service to determine the highest and best utilization of its most valuable real estate holdings.

5. On or about August 31, 1984, defendant GNAU signed a letter to one of Voss' companies which stated that monies to be paid, and which were in fact later paid, to Voss' company would be compensation for efforts pertaining to a non-postal building renovation project.

6. On or about September 1, 1984, defendant GNAU signed a check for $1,500 payable to one of Voss' companies, as a result of commission monies earned by GAI

from an Ohio corporation which was seeking a Postal Service research and development contract on automated warehouse and material handling.

7. On or about October 5, 1984, defendant GNAU signed an agreement, which promised the payment of a contingent commission fee to GAI, with a Detroit, Michigan, law firm which was seeking the sale of real estate properties to the Postal Service.

8. On or about September 3, 1984, unindicted coconspirator Voss had a meeting in Dallas with an officer of REI during which he recommended that REI hire GAI to assist REI in obtaining a MLOCR contract with the Postal Service.

9. In or about October, 1984, defendant GNAU had a meeting at the Dallas airport with the same official of REI referred to in the previous overt act for the purpose of discussing the formation of a consulting relationship between GAI and REI.

10. In or about November, 1984, defendant GNAU and unindicted coconspirator Voss staged a telephone call to deceive Paul N. Carlin into believing that defendant GNAU had been instrumental in obtaining political support and approval for Carlin's pending appointment as Postmaster General (hereinafter "PMG").

11. On or about January 8, 1985, within the District of Columbia, unindicted coconspirator Voss had a conversation with PMG Carlin wherein Voss arranged for defendant GNAU and Marcus to meet with PMG Carlin on January 11, 1985, for the purpose of discussing optical character reader equipment, automated warehousing and Postal Service real estate.

12. On or about January 11, 1985, defendant GNAU received a letter from an officer of REI which (1) stated

REI's intention to enter into a formal agreement for marketing services with GAI, (2) asked defendant GNAU to represent REI at his meeting with Carlin on January 11, 1985, and (3) contained the first of three equal checks, totalling $30,000, as payment for consultation fees.

13. On or about February 5, 1985, defendant GNAU signed the first of three equal checks, totalling $9,000, to one of Voss' companies, representing Voss' share of GAI's consultation fees from REI.

14. On or about February 26, 1985, defendant GNAU, on behalf of GAI, signed a consulting agreement with REI, whereby GAI would assist REI in pursuing a contract with the Postal Service for the purchase of MLOCR systems from REI in return for the payment of one percent of the contract.

15. On or about March 5, 1985, within the District of Columbia, unindicted coconspirator Voss and another Governor, at a meeting with the Chairman of the Board of Governors, persuaded the Chairman that the Postal Service should be directed to cease immediately all activities related to the retrofit conversion kit procurement which was a multi-line developmental program involving awards to three of REI's competitors.

16. On or about May 5, 1985, unindicted coconspirator Voss submitted extensive materials, written by Marcus, including recommendations favorable to REI's position, to other members of the Board under Voss' name without any attribution to Marcus or GAI.

17. On or about May 23, 1985, during an official meeting of the Board of Governors Technology and Development Committee wherein REI made an official presentation of its MLOCR capabilities, unindicted coconspirator Voss, in GNAU's presence, told several Postal Service officials that he did not know GNAU.

18. On or about June 14, 1985, within the District of Columbia, unindicted coconspirator Voss told the Deputy PMG to award REI a noncompetitive contract for the production of 90 MLOCR systems for an aggregate price of approximately $162 million.

19. In or about the summer of 1985, within the District of Columbia, defendant GNAU, unindicted coconspirator Voss and others had a meeting at which they discussed the problems facing a noncompetitive contract award by the Postal Service to REI for MLOCR equipment, including the opposition of PMG Carlin and the Senior Assistant PMG for Operations to that award, and at which they concluded it would be necessary to have both individuals removed from their positions.

20. On or about August 5, 1985, at an official Board of Governors meeting, unindicted coconspirator Voss persuaded Postal Service management, after it had decided to commence a two-part competitive MLOCR procurement, to have a shortened teset preparation period for that procurement.

21. In or about August, 1985, defendant GNAU and Marcus met with officers of REI for the purpose of discussing the receipt of additional consulting fees from REI, resulting in two agreements providing for additional consulting fes of $22,000 per month.

22. On or about September 18, 1985, within the District of Columbia, defendant GNAU and Marcus signed a trust agreement, agreeing to the distribution of GAI's one percent contingent commission fee from REI to themselves, Voss and another.

23. On or about November 12, 1985, defendant GNAU handed the first of four $2500 cash payments to unindicted coconspirator Voss.

24. In or about early December, 1985, after a decision by two members of the Board of Governors to search for a new PMG, unindicted coconspirator Peter E. Voss had a conversation with William A. Spartin wherein Voss discussed Spartin's search for a replacement for PMG Carlin.

25. On or about December 12, 1985, within the District of Columbia, defendant GNAU spoke to an officer of REI in a telephone conversation, asking for REI's suggested candidates to replace PMG Carlin.

26. On or about January 9, 1986, three days after PMG Carlin was removed from office, within the District of Columbia, defendant GNAU met with officers of REI and others, known and unknown.

(Violation Title 18 United States Code, Section 371.2)

COUNT TWO

On or about February 25, 1986, within the District of Columbia, the Eastern District of Michigan, the Northern District of Ohio and elsewhere, defendant JOHN R. GNAU, JR., otherwise than as provided by law for the proper discharge of official duty, directly and indirectly, gave, offered and promised something of value, that is, $2500 in cash, to Vice Chairman of the United States Postal Service Board of Governors Peter E. Voss, a public official, for and because of official acts performed and to be performed by such public official.

(Violation Title 18, United States Code, Section 201(f), 2)

Respectfully submitted,

JOSEPH E. DIGENOVA
UNITED STATES ATTORNEY

By /s/ Joseph S. Valder
Assistant United States Attorney
for the District of Columbia
(202) 272-9019

Date: October 16, 1986

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Criminal Case
v.	:	No. 86-355
	:	(J. Revercomb)
JOHN R. GNAU, JR.	:	

GOVERNMENT MEMORANDUM IN AID OF SENTENCING

The United States, through its counsel, the United States Attorney for the District of Columbia, in order to apprise the Court more fully of the operative facts underlying the charged offenses in this case, submits the following memorandum.[1] The United States specifically requests this Court to impose sentences of appropriate incarcera

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[1] A sentencing judge may consider a wide variety of information as to a defendant's background, character, and conduct, criminal and otherwise, in imposing a sentence. The Supreme Court has consistently held that even acts and conduct *not* resulting in convictions may properly be considered. *See Williams* v. *New York*, 337 U.S. 241, 246-247 (1948) (It was proper for the trial judge to have considered evidence of 30 other burglaries *believed* to have committed by the defendant, as well as the probation report ***); *Williams v. Oklahoma*, 358 U.S. 576 (1959) (The sentencing judge may consider hearsay information which is relevant to the crime and the defendant's life); *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972) (The sentence was affirmed where it was based on information not contained in the presentence report which included evidence of offenses for which the defendant was acquitted.)

See also 18 U.S.C. § 3577 - "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

tion[2] and appropriate fines for Mr. Gnau's extremely serious crimes.

On October 17, 1986, Mr. Gnau entered pleas of guilty to two separate felony charges: conspiracy to defraud the United States (carrying a penalty of not more than five years incarceration and a $250,000 fine) and paying an illegal gratuity (carrying a penalty of not more than two years imprisonment and a $250,000 fine).

The United States recommends to this Court that the sentence in this case must take cognizance of the very serious crimes committed by Mr. Gnau and his assistance to the government's ongoing investigation.

THE FACTS[3]

In July of 1982, Peter E. Voss was appointed to be a member of the Board of Governors of the U.S. Postal Service (hereinafter USPS). Following his appointment to the Board, Mr. Voss participated in two illegal schemes to enrich himself. One had nothing to do with Mr. Gnau, but the scheme in which Mr. Gnau participated was of great magnitude. It involved an agreement between Voss and Gnau for Voss to receive substantial sums of money from Gnau as a result of the use of Voss' official position for his personal financial benefit and as a result of Voss' corrupted advocacy in a particular USPS contract procurement action.

[2] The United States has no objection to concurrent terms of incarceration, and it has no objection to any sentences of incarceration being imposed under 18 U.S.C. § 4205(b)(2).

[3] Beyond the facts contained in the government's proffer of fact at the time of the pleas in this case, the additional facts set forth in this document are a combination of facts derived from extensive document analysis, dozens of interviews and sworn statements of several key participants, including Voss and Gnau, in the events of this case.

The Voss-Gnau conspiracy to misuse Voss' official position for their own financial benefit culminated in the corruption of a large U.S. Postal Service automated mail-sorting equipment procurement. The thorough investigation done by the United States Postal Inspection Service in this case has also uncovered the fact that Voss and Gnau had misued Voss' position on at least four earlier instances of Postal Service business. It was all part of an overall conspiracy to use internal postal service influence, information and documents, in return for money, to enable John R. Gnau, Jr., and his company Gnau & Associates, Inc., to obtain consulting contracts with potential postal vendors. Starting in late 1983, Voss began exchanging the use of his official influence and position to benefit Gnau in exchange for the prospect of personal financial gain for both of them. Voss reached an agreement with Gnau and his company to be paid a thirty percent referral fee, and this agreement eventually covered Voss using his official position to benefit Gnau's business dealings with:

(1) a Delaware corporation, headquartered in Santa Monica, California, which owned a large parcel of real estate in Chicago which it attempted to sell to the Postal Service,

(2) a national real estate brokerage firm which sought to obtain a contract with the Postal Service to determine the highest and best utilization of its most valuable real estate holdings, and

(3) an Ohio corporation which sought a Postal Service research and development contract on automated warehouse and material handling, and

(4) an Ohio corporation which sought a Postal Service timekeeping equipment contract.

Voss in fact received $6,000.00 from Gnau pertaining to the third item listed above, starting in early September 1984, at the same time that he was setting into motion the corruption of a massive Postal Service automated mail-sorting equipment procurement. The Voss-Gnau conspiracy to misuse Voss' official position finally centered upon the Postal Service procurement and controversy concerning the feasibility of using single-line optical character readers (hereinafter sometimes referred to as "SLOCR's") for sorting mail.[4]

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[4] The U.S. Postal Service has contracted over the years for the purchase of single line optical character readers. These machines are designed to "read" city, state and zip code (five or nine digit) on a piece of mail and print a corresponding "bar code" on the envelope. The piece of mail can then be sorted with a minimum of manual handling. The USPS sought to expand the zip code from five to nine digits so that the mails could be sorted and processed much more efficiently by the SLOCRs. During the latter half of 1984, the USPS became concerned with the nine digit zip code usage which was not as high as predicted. When a piece of mail contained a nine digit zip code, mail than five digit zip coded mail. Since SLOCRs are not capable of assigning a nine digit zip code to a piece of mail bearing a five digit zip code, the USPS began to examine "multi-line" technology. Multi-line optical character readers (hereinafter sometimes referred to as "MLOCRs") would be able to "read" the full address on a piece of mail, assign the appropriate nine digit zip code and print the corresponding "bar code" onto the mail. Multi-line reading is a considerably more expensive and technically difficult approach Zip + 4 bar code (nine digit zip code) than the "single-line" approach. By mid-1984, based on technical federal studies, the recommendation of the General Acconting Office and the support of Congress, the Postal Service had initiated a program to develop and study multi-line read capability for possible future implementation. As part of its program, the USPS was discussing with the original SLOCR equipment manufacturers, Burroughs, Pitney Bowes and ElectroCom Automation (ECA), the development of kits to be retrofitted to the manufacturers' SLOCR equipment, thereby converting it to MLOCR capability.

It was in the context of this optical character reader procurement that Voss used his inside position and information to facilitate the next phase of the conspiracy. On September 3, 1984, Voss met with an executive of Recognition Equipment, Inc. (REI), a Dallas manufacturing corporation which was not involved in supplying the original SLOCR equipment but which was interested in producing MLOCR equipment. REI had been a disappointed competitor of ECA on a previous SLOCR procurement, and it had had a history of problems on prior USPS procurements. At that meeting, Voss recommended that REI hire Gnau and his Detroit public relations firm,[5] to present REI's MLOCR proposal to the USPS. During the fall of 1984, a meeting and various telephone calls, including one from Voss to REI's president, occurred for the purpose of convincing REI that Gnau & Associates would be valuable in REI's plans to obtain a postal MLOCR contract.

As part of the Voss-Gnau plan to obtain business and money for themselves by manipulating Postal Service business, Voss arranged for the incoming Postmaster General (hereinafter "PMG") Paul N. Carlin to listen in on a staged telephone conversation between Voss and Gnau which Carlin believed was spontaneous. Unknown to Carlin, the conversation, wherein Gnau fictitiously described how he had helped to obtain White House approval for Carlin's appointment, was staged for the purpose of making Carlin feel indebted to Gnau.[6]

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[5] During late 1984, Voss was introduced by John R. Gnau, Jr., to William A. Spartin, who was at the time President of Gnau & Associates, Inc. and President of MSL Incorporated. Voss had earlier been introduced to Michael Marcus, Vice-President and Treasurer of Gnau & Associates, Inc.

[6] Voss, a member of the Board of Governors Contingency Committee, was instrumental in Carlin's selection as the new PMG and also

Beginning in January of 1985, Voss arranged for Gnau and Marcus to meet with the Postmaster General, Board of Governors and various officials of the USPS to discuss the corporation's multi-line optical character reader equipment. In particular, Gnau and Marcus were able to meet with the new PMG on January 11, 1985, just a few days after he took office, believing he would be favorably disposed to their discussions about Postal Service real estate holdings, automated warehousing and topical character readers. Contemporaneously Gnau & Associates concluded negotiations with REI resulting in a contract to assist REI in pursuing the multi-line optical character reader contract with the USPS. Under the term of the contract, REI would pay a $30,000 fee to Gnau & Associates in three equal installments, reimburse expenses incurred and pay a fee of one percent of the finalized contract price. Voss, Marcus, Gnau and Spartin decided that the fee would be divided equally among themselves. (The contract value for the purchase of the multi-line optical character readers was estimated to be in the range of $250-400 million dollars.[7]) REI began payment to Gnau & Associates under the terms of the contract in January of 1985. Gnau & Associates then issued checks to Decision Systems Incorporated, one of Voss' companies. Between

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other top Postal Service officials who were later to feel the attempted influence of Voss in their official acts.

[7] The total life cycle cost for this procurement is estimated to be in the range of eight billion dollars. Total life cycle cost is calculated by adding the ten year net present value of the total operating cost (assuming a 6% inflation rate and a 10.5% discount rate) to the year zero cost. The year zero cost equals the loaded unit price (bid price plus initial maintenance cost) modified for throughput. Based on the test data, the total operating cost equals cost of processing 1000 pieces of mail x 264,000 pieces per day x 286 days per year, plus maintenance cost (preventive and corrective labor, spare parts, and training).

February 5, 1985 and May 10, 1985, Voss received $9,000.00 from Gnau & Associates.

On March 5, 1985, Voss, along with another member of the Board of Governors, but without the required participation or knowledge of the full Board, persuaded the Chairman of the Board of Governors that USPS management be directed to cease immediately all activity related to the conversion kit procurement. This action was necessary to the ultimate goals of the defendant's scheme because it provided the ground work for the immediate opportunity for REI to be considered for any further USPS OCR procurements.

On May 10, 1985, Voss, Gnau and Spartin met in Bloomfield Hills, Michigan and discussed, among other things, the distribution of the fee to be received by Gnau & Associates from REI related to the pending USPS procurement.

From May through July of 1985, Voss encouraged, recommended to and instructed Deputy Postmaster General Jackie Strange that the USPS should purchase the MLOCR system, on a noncompetitive basis, from REI. Additionally, Voss instructed the Deputy Postmaster General to prepare a decision analysis supporting his recommendations and to make an effort to bypass the established review/approval contracting process. Although Voss was unsuccessful in obtaining a noncompetitive award to REI, he had set events into motion which resulted on August 5, 1985, in USPS management recommending, and the Board of Governors agreeing, that the USPS would commence a two-part competitive MLOCR procurement. Soon thereafter REI and ECA signed competitive test agreements pertaining to MLOCR equipment.

Thus, with Gnau and Voss' assistance, REI's competitive situation improved from its pre-March 5, 1985,

status for not being eligible for any open Postal Service OCR procurement to its post-August 5, 1985, status of being fully eligible to win a MLOCR contract with its MLOCR equipment and technology, which were ahead of that of its competitors. Bowing to Voss' persuasion, USPS management decided not to award any research and development money on this procurement. This was a decided disadvantage to REI's competitors since REI had had fifty million dollars of USPS research and development money at its disposal during previous years for multi-line technology. Despite the fact that the USPS had signed an agreement with REI and ECA to test competitively their multi-line optical character reader systems, Voss continued to press for an immediate non-competitive contract award to REI during the fall of 1985.

In June of 1985, Messr. Gnau and Marcus delivered an agreement to Mr. Spartin's office setting up procedures for dividing the one percent bonus payment to be received upon contract award. Mr. Spartin discussed the agreement with Voss. Voss explained that Marcus told him he prepared the agreement because of doubts that Gnau would actually disburse the funds after receipt from the corporation. Spartin indicated that documents of the nature of the agreement were dangerous and could implicate the parties. Nevertheless, in September of 1985, Gnau and Marcus delivered to Spartin a revised agreement to divide the proceeds among the participants. Around the same time, REI amended and expanded its agreement with Gnau & Associates resulting in monthly payments to Gnau & Associates in the amount of $22,000.00 a month, beginning in October of 1985.[8] When Voss learned of the amended agree-

[8]From October of 1985 to April of 1986, Voss arranged with Spartin to receive airline tickets in the name of B. Spartin. The airline reservations were made by Voss but paid for by Mr. Spartin or Spartin's office. These tickets, totalling approximately $4500, were

ment between REI and Gnau & Associates, he had a number of conversations with Marcus, Gnau and Spartin complaining about not receiving his share of the new revenues. Thereafter, Gnau made four payments to Voss between November of 1985 and February of 1986. Each payment was $2,500.00 in cash paid personally by Gnau on two occasions and paid by Gnau via air courier express on two other occasions.

The total amount of money and property paid to Voss by Gnau to date under the above-described scheme is approximately $25,000 while in another part of the conspiracy Voss received nearly $5,000 in airline tickets from Spartin.

LOSS TO THE POSTAL SERVICE

The corruption of Peter Voss and his activities in the Postal Service's potential $250-400 million OCR contract has had a significant, measurable and adverse impact on the U.S. Postal Service. Postal officials made decisions based on Voss' anticipated reaction and not in the best interests of the Postal Service or the public. Management's unprecedented decision not to fund the competitive test agreements is a perfect example. This decision favored REI because it had already received fifty million dollars in developmental funding. Management, lacking the power to oppose Mr. Voss and fearful of incurring his wrath by expending additional development funds, invited vendors to participate in a test of equipment developed at their own expense with no guarantee any sales would result. This was a reversal of normal postal procurement

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payments to Voss for his efforts in obtaining recruiting contracts for Spartin with the Postal Service and the Board of Governors, which are discussed, *infra*.

practice and a major factor in Pitney Bowes and Burroughs deciding not to participate in the test. Voss had eliminated two of REI's three competitors, and anything good for REI was good for Voss.

Gnau and Voss' greed and personal ambition set in motion a course of events which culminated in a scandal within the Postal Service of the greatest proportions. They had maneuvered William Spartin into a position of respect with the highest officials of the Postal Service. Voss introduced Spartin to then Postmaster General Paul Carlin who utilized Spartin to recruit high level officials. Voss encouraged meetings between Spartin and Deputy Postmaster General Jackie Strange, which enabled Spartin to gain valuable insight into various management procedures and initiatives. Voss introduced Spartin to Board of Governors Chairman John McKean who periodically sought Spartin's counsel on personnel matters and ultimately hired Spartin to recruit a new Postmaster General to take the place of PMG Carlin who was an obstacle to the sole source award to REI. Of course, Voss failed to disclose to Carlin, Strange or McKean that Spartin was President of Gnau & Associates, Inc., a consultant for REI on the MLOCR procurement with a substantial personal financial stake in the outcome of the MLOCR procurement.[9] Predictably, Spartin also failed to disclose that he had obtained the name of the candidate he recommended for PMG from the president of REI.

[9]On or about March 3, 1986, the remaining Postal Governors learned that William A. Spartin was both the president of MSL and GAI. In a specially convened Board of Governors meeting wherein the Governors discussed William Spartin's apparent conflict of interest as it related to the recruitment of an interim and permanent PMG, and deliberated whether any corrective action was necessary, Peter Voss denied any knowledge of Spartin's relationship with REI and GAI. Furthermore, Voss told the remaining Govenors that after referring representatives of GAI to PMG Carlin he had no contact with GAI.

Investigation since the date of Mr. Voss' plea, May 30, 1986, has shown that the payoff arrangement Voss had with Gnau & Associates, Inc. for the proceeds of business steered to Gnau & Associate, was only one of many such arrangements, five of which dealt with the Postal Service. According to Mr. Marcus, Voss, Gnau and their associates planned a massive scheme to do nothing less than "capture" and "own" the U.S. Postal Service. They planned to have the Postal Service hire the parent company of Spartin's firm (which had no knowledge of or participation in any of the illegal activities discussed in this memorandum), to do a management reorganization study which they could influence. This reorganization was to result in the displacement of 30-50 top and middle level USPS managers. They planned for William Spartin to recruit persons who would therefore logically feel friendly toward the Spartin organization to fill those positions. With this base, Voss, Gnau and their associates planned to ensure that REI and other businesses represented by Gnau & Associates, Inc. would receive favorable treatment from the USPS. Through the cadre of Spartin's recruits, they planned to manipulate the Postal Service for their personal gain for years into the future. Fortunately, these plans did not come to fruition.

The direct cost to the Postal Service of Voss and Gnau's activities over and above the amount Voss received are difficult to quantify. Without Voss' corrupt influence, the Postal Service would have undoubtedly invested significant resources to ensure a fair procurement decision. The real damage, however, is that Voss' direct corrupt acts caused a freeze and cancellation of the Postal Service's program to develop multi-line capability for single-line equipment while, at the same time, his corrupt acts have also resulted in the automation program being frozen while investigations are conducted and associated pro-

blems are resolved to be sure the procurement action can proceed with the least possible effect of Voss' corrupt influence.[10] Succinctly stated, in an age of automation, Gnau and Voss will have caused an estimated two and one-half-year delay in automation at the Postal Service.

While Peter Voss was actively campaigning for REI he claimed the Postal Service was losing $1.2 to $2 million in productivity for each day the MLOCR deployment was delayed. Postal managers disputed these figures but said the amount may have been as much as hundreds of thousands of dollars per day. The program was put on hold on June 6, 1986. This program is now dead and any possible resurrection must await the outcome of the 1987 single-line retrofit procurement. Accordingly, this immense restructuring and delay will have caused the Postal Service to forego savings of hundreds of millions of dollars. These enormous costs are real and directly attributable to the corruption caused by Gnau, Voss and their associates. They will ultimately be paid by the American public through their postal rates.

Gnau must shoulder the responsibility for the results of his conspiracy with Voss and others. They have shaken the morale of postal managers from top to bottom. They have shackled the agency's efforts to modernize its mail processing operation. They have reduced the public's confidence in the USPS's ability to carry out its mandate and manage its business in the nation's best interest. Perhaps most serious of all, they have enhanced public perceptions that appointed government officials put their own interests ahead of all others in executing their sworn duties.

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[10]On November 21, 1986, the Postal Service announced that it would commence a new single-line retrofit procurement in January of 1987, thereby effectively to its procurement position as of July 1984.

JOHN R. GNAU JR.'S COOPERATION

Mr. Gnau has been fully honest, candid, helpful and cooperative in all respects and at all times during his debriefings by the government. The United States has no reason to believe that he ever sought to deceive the investigators or in any way to mislead the government. His long and candid sworn statement played a direct role in the decision of another coconspirator to plead guilty to certain felonies.

Because of his cooperation Mr. Gnau is certainly entitled to a benefit from this Court, as it deems appropriate, in weighing all of the factors appropriately involved in this sentence.[11]

THE UNITED STATES' POSITION ON SENTENCE

We cannot emphasize too strongly that the United States has two very serious (and somewhat conflicting interests in this Court's sentence of Mr. Gnau. First, the sentence ought to directly address the magnitude of his crimes, and, second, the sentence ought to include a benefit from this Court because of his pleas and his help and assistance to the government in its continuing investigation.

In considering the imposition of an appropriate prison sentence on the defendant this Court should weigh, as suggested in *Williams* v. *New York, supra,* note 1, the following factors:

1st The protection of society against wrongdoers.

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[11] To the extent this Court may weigh Mr. Gnau's sentence relative to that imposed on Mr. Voss, Mr. Gnau clearly is not entitled to the benefit Mr. Voss may have received for his very early pleas of guilty.

> 2nd The punishment – or much better – the discipline of the wrongdoer.
>
> 3rd The reformation and rehabilitation of the wrongdoer.
>
> 4th The deterrence of others from the commission of like offenses. [Quoting from Blueck, *Probation and Criminal Justice,* p. 1$13 (1933).]

See also United States v. *McNair,* 18 F.R.D. 417, 421 (D.D.C. 1956), *aff'd,* 98 U.S. App. D.C. 359, 235 F.2d 856, *cert. denied,* 352 U.S. 989 (1957).

That the defendant committed deliberate and premeditated crimes goes without question. The defendant enjoyed the advantages of coming from an excellent background with a very comfortable lifestyle. He cannot in any way be considered a deprived member of society, but, rather, he must be considered a very privileged member of society. His crimes, we submit, were simply the result of greed and arrogance.

Most important, in our view, is the deterrent effect of appropriate sentences in cases such as this one. The imposition of appropriate sentences for white collar procurement fraud will generate an awareness in society that members of the public and high level officials who engage in such crimes are not given favored treatment and that such crimes do not pay. All too often white collar criminals are given relatively lenient sentences. In fact in *Browder* v. *United States,* 398 F. Supp. 1042 (D. Ore. 1975), a white collar criminal challenged his unusually stiff sentence on the grounds that white collar criminals normally receive light sentences and that, therefore, his stiff sentence constituted cruel and unusual punishment.

The petitioner based his claim on a study of 100 cases involving white collar crimes purporting to show that all 100

defendants had received either probation or extremely light sentences. In rejecting petitioner's claim, the district judge commented:

> If Mr. Browder's study is accurate, the pattern of sentencing revealed is deplorable.
>
> If there is a logic to this paradox, it eludes me. I cannot reconcile a policy of sending poorly educated burglars from the ghetto to jail when men in the highest positions of public trust and authority receive judicial coddling when they are caught fleecing their constituencies. Penology's recent enchantment with rehabilitation as a wholesale justification for imprisonment has dissolved in the face of numerous studies proving that rehabilitation rarely occurs. A minority of the prison population are rightfully locked up because they are too dangerous to release. If we are to justify imprisonment for the rest, it must be on the grounds of punishment or deterrence. And if this is our premise, the white collar criminal must come to expect equal or greater treatment than the common, non-violent thief.
>
> * * *
>
> The sentencing judge may have shared my dismay, and Browder's, at the pattern of white collar crime sentences. White collar crimes pays. It will continue to do so as long as judges endorse it through their sentencing policy.
>
> * * *
>
> I doubt that deterrence will be very effective until the 'executive' becomes convinced that if he embarks on a criminal adventure, he will be severely – though proportionately – punished. Certainty is the key. 398 F. Supp. at 1046-47.

The problem has also been addressed by then District,

now Senior Circuit, Judge J. Skelly Wright in an article *Sentencing the Income Tax Violator: Statement of the Basic Problem,* 30 F.R.D. 302 (1961), where he stated in response to the question why incarcerate an income tax law violator: "[T]he answer is that the only real purpose of an income tax sentence is its deterrent value." 30 F.R.D. at 304-304. He continued:

> And I suggest to you that the highest responsibility of the Judge in sentencing income tax offenders is not to think of the offender, particularly, but to think of the purpose for which the income tax law was passed, and why it was made a criminal offense. . . . 30 F.R.D. at 306.

The "responsibility" noted by Judge Wright is applicable to all fraudulent offenses; otherwise potential future offenders will not be deterred.

Against this total background and for such other reasons as may be advanced at the sentencing hearing, the position of the United States is that this Court should impose a sentence of appropriate incarceration and fines on Mr. Gnau. Any other sentence would sanction the flagrant attempted thievery and the calculated, premeditated and arrogant crimes of this defendant and others in similar situations. That the defendant is a so-called "white collar criminal", with status and education, provides no basis whatsoever for judicial treatment more lenient than that accorded criminals who have not obtained the "white collar" label. Indeed, the defendant's background only serves to underscore the calculated, premeditated and arrogant nature of his crimes. Moreover, this Court should not condone a double standard of justice which accords lighter sentences for those criminals from the middle and upper classes.

At stake is the integrity of the criminal justice system If

it is to have any real meaning – if those who would and are perpetrating similar fraudulent schemes are to be deterred in any real sense and if the honest and law-abiding citizen is to know that his honesty is not in vain – then an individual such as this defendant must be held responsible for his conduct and an appropriate sentence msut follow from his substantial criminal activity.

Respectfully submitted,

/s/ Joseph E. Digenova
JOSEPH E. DIGENOVA
United States Attorney
for the District of Colubmia

/s/ Stephen R. Spivack
Stephen R. Spivack
Assistant United States Attorney

/s/ Joseph B. Valder
Joseph B. Valder
Assistant United States Attorney
(202) 272-9019

CERTIFICATE OF SERIVCE

I HEREBY CERTIFY, that a copy of the foregoing has been mailed, postage prepaid, to David F. DuMouchel, Esquire, 1930 Buhl Building, Detroit, Michigan 48226 and Earl J. Silbert, Esquire, 1025 Thomas Jefferson Street, N.W., Suite 300 E., Washington, D.C. 20007, this 10th day of December, 1986.

/s/ Joseph B. Valder
Joseph B. Valder
Assistant United States Attorney
(202) 272-9019

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	Criminal No. 87-23
v.	:	
	:	(Judge Revercomb)
MICHAEL B. MARCUS	:	

GOVERNMENT MEMORANDUM IN AID OF SENTENCING

The United States, through its counsel, the United States Attorney for the District of Columbia, in order (1) to apprise the Court more fully of the operative facts underlying the charged offenses in this case and (2) to inform the Court of the full nature and extent of Mr. Marcus' cooperation with law enforcement authorities, submits the following memorandum.[1]

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[1]A sentencing judge may consider a wide variety of information as to a defendant's background, character, and conduct, criminal and otherwise, in imposing a sentence. The Supreme Court has consistently held that even acts and conduct *not* resulting in convictions may properly be considered. *See Williams v. New York*, 337 U.S. 241, 246-247 (1948) (It was proper for the trial judge to have considered evidence of 30 other burglaries *believed* to have been committed by the defendant, as well as the probation report ***); *Williams v. Oklahoma*, 358 U.S. 576 (1959) (The sentencing judge may consider hearsay information which is relevant to the crime and the defendant's life); *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972) (The sentence was affirmed where it was based on information not contained in the presentence report which included evidence of offenses for which the defendant was acquitted.)

See also 18 U.S.C. § 3577 — "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

THE FACTS

On January 20, 1987, Mr. Marcus entered pleas of guilty to two counts of paying an illegal gratuity in violation of 18 U.S.C. § 201(f), each carrying a penalty of not more than two years incarceration and not more than a $250,000 fine.

The United States relies primarily on the fact statements contained in the allocution memoranda filed in the cases of *United States* v. *Peter E. Voss* (Criminal No. 86-195) and *United States* v. *John R. Gnau, Jr.* (Criminal No. 86-355), copies of which are attached. Beyond those facts, we will simply detail Mr. Marcus' role and activities which caused him to participate in the payment of illegal gratuities to Mr. Voss.

Mr. Marcus, Vice President and Treasurer of Gnau & Associates, Inc., was aware as early as the summer of 1984 that United States Postal Service Governor Peter E. Voss was being paid monies by Gnau & Associates, Inc. (GAI), on matters which pertained to the Postal Service. Shortly after GAI was retained by REI to help it obtain Post Service OCR business, Mr. Marcus began to direct his time and efforts to undermine the positions of REI's competitors and to obtain a competitive position for REI. One of Marcus' primary tasks on the OCR issue was to create distrust by other Board of Governors members of (1) REI's competitors, (2) the Postmaster General and (3) the rest of the United States Postal Service management. He did this primarily through an extensive pattern of telephone calls with one Board member using internal information and documents (provided by Mr. Voss) belonging to the Board and to postal management.

Mr. Marcus' other principal means of persuasion was to prepare written materials advocating REI's position for

submission, through Voss, to the other Board member who was slowly persuaded to favor REI. That Board member and Voss then submitted several of Marcus highly technical and pro-REI written presentations to the Board as the independent work product of the Board's Technology and Development Committee.

Through means like those described above, Mr. Marcus worked steadily throughout 1985 for the award of a postal contract for OCR equipment to REI. He also served as a knowing conduit of internal board and postal management information and documents from Voss to REI while knowing that Voss obtained those items while being paid by GAI and while expecting large future payments from GAI as a result of REI postal OCR business.

In that regard, beginning in January of 1985, Marcus, Gnau and Voss agreed that there would be an equal split of REI's commission to GAI. By September of 1985, Marcus, being concerned that he would not actually receive his equal share, caused a writen agreement to be drafted guaranteeing an equal split of the REI-GAI commission among Marcus, Gnau, Voss (whose name was carefully not mentioned) and Spartin. Marcus and Gnau signed it and gave it to Spartin. On November 11 and December 16, 1985, Gnau, acting in furtherance of the agreement to share REI commissions with Voss, personally gave $2,500.00 in cash to Voss from REI's monthly commission advances to GAI.

MR. MARCUS' COOPERATION

Mr. Marcus, his wife and his counsel met with postal inspectors and the undersigned Assistant United States Attorney in late July 1986. After being confronted fully with the facts known to the investigators at that time indicating

that Mr. Marcus had knowingly participated in a scheme which had defrauded the Postal Service, he admitted that he had knowingly participated and aided and abetted in the payment of illegal gratuities to Mr. Voss.

Mr. Marcus also agreed at that same time to cooperate fully with the United States Postal Inspection Service and the United States Attorney's Office in unraveling the scheme to defraud the Postal Service on its MLOCR policy formulation and future MLOCR procurements. He thereafter met with the inspectors and the undersigned, often for full consecutive days of interviews, to reveal fully his exceedingly detailed and accurate recollection of the facts in this case.

These interviews resulted in a twenty-three-page sworn summary of his recollections which played a direct and important role in the decision of John R. Gnau, Jr., to plead guilty to conspiracy and paying an illegal gratuity. Mr. Marcus also cooperated in making the timing of his cooperation highly useful to the government in presenting this Court accurate information for use in the Voss sentencing and the Gnau plea and sentencing. He also participated in other interviews supplying useful information about unrelated events in other federal districts.

In summary, the United States represents to this Court that Mr. Marcus' cooperation with the government in this matter was of significant value.

Beyond the representations in this memorandum, the United States will, of course, be prepared to answer any further questions of the Court at the time of sentencing.

Respectfully submitted,

/s/ Joseph E. DiGenova
JOSEPH E. DIGENOVA
UNITED STATES ATTORNEY

/s/ Joseph B. Valder
JOSEPH B. VALDER
ASSISTANT UNITED STATES
ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing has been mailed, postage prepaid, to Charles Shaffer, Esquire, 100 Park Avenue, Rockville, Maryland 20850 this 26th day of February, 1987.

/s/ Joseph B. Valder
Joseph B. Valder
Assistant United States Attorney
(202) 272-9019

APPENDIX L

ZIP + 4/AUTOMATION INVESTIGATIVE REPORT JANUARY 1987

[Pages 290-323: "Conspiracy Investigation"]

POSTAL INSPECTION SERVICE

CONSPIRACY INVESTIGATION

Background

This section of the report details conduct by United States Postal Service (USPS) Board of Governors Members Peter Voss, Ruth Peters, and others concerning their interaction with a consulting firm Gnau and Associates, Inc. (GAI), which represented Recognition Equipment, Inc. (REI). REI sought a contract to sell the USPS automated mail processing equipment, specifically, multi-line optical character readers. Governors Peters and Voss, assisted by GAI and REI, pressured USPS management to move quickly from an automation program which deployed single-line optical character reader (SLOCRs) to a program deploying multi-line optical character reader (MLOCRs, Phases IIA and III). Although our investigation stopped the conspiracy short of fruition, action of the conspiractors resulted in REI's eligibility for a $250 to $400 million production award.

Peter E. Voss was appointed to the United States Postal Service Board of Governors in or about July 1982. On January 7, 1986, he was elected Vice Chairman of the Board of Governors. On May 30. 1986, incident to

pleading guilty in federal district court to agreeing to accept a gratuity, accepting a gratuity and embezzlement of Postal Service property, Peter Voss resigned from the Board of Governors.

> Peter Voss was the President and owner of Decision Systems, Inc., a small and unprofitable Ohio company dealing in consulting and commercial acquisition activities. Decision Systems, Inc. traded under several different company names, including Midland Engineering. Voss' use of Midland Engineering's name in press releases and during USPS meetings added false credibility to his technical background and experience. Sharon Peterson was an officer of Decison Systems, Inc. and Peter Voss' executive assistant. Peter Voss routinely billed the USPS for services Peterson performed allegedly on behalf of the USPS.

> Ruth O. Peters, Chairman of the Board's Technology and Development Committee, was appointed to the Board of Governors in or about December 1983. She is a retired USPS employee who attained the position of Director of the Office of Postmaster Selection during her 26-year career.

> Gnau and Associates, Inc. (GAI) is a Michigan corporation specializing in public relations and governmental consulting. The staff of GAI was limited primarily to John R. Gnau, Jr., Chairman, William A. Spartin, President, and Michael B. Marcus, Vice President and Treasurer. William A. Spartin, President, GAI,

was also the President of MSL International Consultants, Ltd. (MSL), an executive placement firm.

John R. Gnau, Jr., William A. Spartin, and Michael B. Marcus agreed that Voss would assist GAI by referring to GAI entities seeking contracts with the USPS. GAI agreed to pay Voss 30% of all revenues realized by GAI as a result of Voss' referrals. Voss further agreed to furnish GAI inside information and internal documents relative to USPS procurements and policy development. Voss also agreed to circumvent and manipulate the USPS's contract and procurement process to ensure the award of USPS contracts to the entities GAI represented.

Recognition Equipment, Inc. (REI) is a Delaware corporation headquartered in Irving, TX. REI is engaged in the design, manufacture, and distribution of optical character reading equipment.

ElectroCom Automation (ECA) is an Arlington, TX company engaged in the design, manufacture, and distribution of optical character reading equipment.

The United States Postal Inspection Service does not make any conclusions relative to the guilt or innocence of the individuals or entities identified herein. It should by noted that Peter Voss, John R. Gnau, Jr., and Michael B. Marcus have been convicted for their respective roles in the activities reported herein. The investigation is continuing and, therefore, certain evidence, specifically that resulting

from grand jury inquiries, agreements with certain individuals, and information critical to future actions cannot be included in this report.

In early 1985, the Inspection Service was aware and concerned that the Technology and Development Committee of the USPS BOG had expressed an intense interest in postal automation and was applying heavy pressure on postal managers to accelerate the procurement of multiline OCRs. An Inspector was assigned to monitor actions and explore concerns that were evolving.

On July 3, 1985, the Headquarters Capital Investment committee (CIC) members (Senior Assistant PMG level proposal to purchase MLOCRs. The proposal was hurriedly prepared and contained seven separated decision analyses showing various scenarios of equipment purchases and deployments, complete with the Return on Investment (ROI) for each scenario. One alternative, No. I-A, was included at the last minute by Deputy Postmaster General Jackie Strange. Alternative I-A was added to the proposal after a July 2, 1985, meeting and teleconference among Mrs. Strange, Peter Voss, and Ruth Peters. The committee (CIC) members (Senior Assistant PMG level managers) were instructed by Deputy Postmaster General Strange, through Gordon A. Morison, Acting Senior Assistant Postmaster General, Administration, that all alternatives could be considered, but that the proposal would go forward recommending Alternative 1A. This alternative called for the procurement of dual transport MLOCRs and did not include the conversion of Phase I and II SLOCRs. Dual transport design is unique to REI equipment.

It was not clear what role the CIC was intended to play in this procurement. However, they clearly would not support positive action on any of the proposals that day and returned the Decision Analysis Report to the Finance Department for independent validation of the ROI figures. The validations had not been done, as was the normal practice, because of the extremely short time frame in which the Decision Analysis Report had been prepared. It was noted that several alternatives had a greater ROI than Alternative I-A.

The Chief Postal Inspector attended the July 3, 1985, CIC meeting. He was very concerned with actions which appeared to circumvent normal channels. Combining this incident with earlier suspicions, he intensified investigative attention. He voiced concerns to Paul Carlin that the procurement remain competitive and suggested that the PMG keep him fully informed with the request.

On Sunday, July 14, 1985, Chief Inspector Clauson, together with other top postal managers, assisted Postmaster General Paul N. Carlin in preparing a letter addressed to the USPS Board of Governors. That letter announced that Deputy Postmaster General Jackie Strange and James V. Jellison, Senior Assistant Postmaster General, Operations Group, would be relieved of decision making responsibility regarding the MLOCR procurement. That function was being assumed by Postmaster General Carlin. Mr. Carlin detailed William V. Chapp, Assistant Postmaster General, Engineering and Technical Support Department, to assist him in coordinating the procurement of automated mail processing equipment. In the letter, Mr. Carlin advised the Board that he had requested an Inspector be permanently assigned to monitor USPS automation procurement efforts.

The Chief Inspector assigned Inspector Robert J. Edwards, Office of Audit, USPS Headquarters, to that effort. Inspector Edwards had headed the Inspection Service review of Phase I and II automation procurements.

On July 18, 1985, Chief Inspector Clauson was briefing Deputy Postmaster General Strange on another matter. At the conclusion of the briefing, Mrs. Strange indicated she had been greatly troubled for some time by the activities of certain Board members. She suggested that a member of the Board of Governors had exerted undue influence on her to steer the procurement of MLOCRs to REI. She named Peter E. Voss as the Governor applying the influence. She also told Chief Inspector Clauson that Peter Voss had misrepresented himself as speaking for the other Governors in attempting to maneuver the actual commitment of a contract. Mrs. Strange told the Chief Inspector she had even visited an attorney and explained her fears about "exposure" she might have as a result of Governor Voss' attempts to influence her. Mrs. Strange told the Chief Inspector she did not have evidence of criminal conduct, but she believed that no person would go to the extremes that Governor Voss had gone in an attempt to influence the procurement without some personal motive.

Later that afternoon, Chief Inspector Clauson and Regional Chief Inspector Raymond Oldham visited Mrs. Strange. She reiterated many of the same concerns and further advised that Ruth O. Peters, Chairman of the Technology and Development Committee of the USPS Board of Governors, had told her, "Peter will get me in trouble," in speaking about the efforts of Governor Voss to influence the procurement. Mrs. Strange then asked for another discussion of the subject during the following week, after she had more time to think about it.

The Chief Inspector quickly assembled a task force including Regional Chief Inspector Joseph M. Kelly, along with Inspector Edwards and Inspector Bruce Chambers, who had extensive experience in complex fraud investigations, to investigate the allegation expressed by Deputy Postmaster General Strange.

Task force members interviewd H. Currie Boswell, General Manager, Mechanization and Development Division, on July 19, 1985. Mr. Boswell has been involved in USPS automation efforts since the mid-1970's. He provided the Inspectors with comprehensive background data on multi-line procurement issues and corroborated the statements of Deputy Postmaster General Strange regarding the pressure applied to her and other postal managers by Governors Voss and Peters regarding the entire MLOCR procurement process, but particularly the presentation to the CIC on July 3, 1985.

Mr. Boswell had heard Governor Voss state repeatedly to Deputy Postmaster General Strange and others that the Board of Governors Technology and Development Committee did not want to hear anything that did not result in a sole source award to REI. Boswell advised the Inspectors that Governor Voss had made comments to others that their careers in postal management could be adversely affected if they did not support him on the MLOCR issue. Boswell stated that Governor Voss, supported by Governor George Camp, indicated that former Postmaster General William F. Bolger and former Deputy Postmaster General James Finch had been "Taken care of." Governor Voss implied a similar fate for the Senior Assistant Postmaster General James V. Jellison as a result of his action relative to USPS automation strategy.

With the substantiation of Mr. Boswell's statements, Chief Inspector Clauson and Regional Chief Inspector Kelly again interviewed Mrs. Strange on July 25, 1985. Mrs. Strange said she had reevaluated the entire situation in the intervening week, and now believed Governor Voss was acting in the best interests of the Postal Service. She said the emotions and tempers that displayed were the result of deeply held beliefs about the best course for the Postal Service to follow and the result of intense personalities in conflict on a Postal Service policy issue. The inconsistencies of the statements made by Governors Ruth Peters and Peter Voss to Mrs. Strange and Mr. Boswell with the testimony of Governors Peters and Voss to Congress that same month were discussed. Mrs. Strange down-played those apparent inconsistencies. In summary, she did not furnish any information or details to support any wrongdoing, either criminal or ethical, but rather described the entire situation as a period of great intensity which resulted in a lot of "hard" exchanges between her and Governor Voss in trying to reach a business decision for the USPS. Although the DPMG declined to assist Inspectors at that time, her disclosures served to support Inspection Service suspicions. A more detailed investigative agenda was developed.

Over the next several months, Inspector Edwards met with USPS personnel involved in the MLOCR procurement issue and attached numerous meetings of managers involved in this procurement effort. He learned of the aggressive sales effort by REI, both at REI's plant in Dallas, TX and at Board of Governors meetings in Washington, D.C. He also learned of the intense lobbying effort by REI of numerous members of Congress, resulting in multiple Congressional inquiries (which were aimed at supporting REI's position), to USPS management as to the status of the MLOCR procurement effort.

We observed that once Peter Voss was appointed to the Technology and Development Committee, the actions of the committee on this issue were raised to a level inconsistent with normal business interest. The repeated invitations to REI for sales presentations and the quantity of committee memorandums to management suggested there was much more to the actions than merely an interest in assuring the USPS was pursuing the correct policy on the automation of its mail processing system. The combination of the Technology and Development Committee's efforts with those of REI and their Congressional supporters amounted to a "flood tide" of facts and opinions designed to sweep away any objection to a noncompetitive award to REI.

During these months, Regional Chief Inspector Kelly was relieved from the task force and Inspector Chambers became fully involved on another major procurement investigation (Jackson/Perholtz PSDS). Inspector Michael C. Hartman was assigned to assist Inspector Edwards. Inspector Hartman had previous experience in postal operations and mail fraud investigations.

REI and ECA/AEG were the only vendors who signed competitive test agreements with the USPS for Phase IIA and III. The contract required ECA/AEG to furnish nonproprietary data to REI, which REI could use to develop the retrofit kit for ECA/AEG machine. A dispute developed between REI and ECA/AEG over the information to be supplied. REI claimed ECA was not furnishing enough data to allow REI to interface its electronics to the ECA/AEG machine. ECA/AEG feared REI would release proprietary data to other competitors, (possibly Toshiba of Japan), who collaborated with REI during the Phase II competition. A series of letters were exchanged

by both firms and addressed to the USPS contracting office to plead their respective cases. REI scheduled an October 17, 1985, meeting at the REI plant for a technical briefing with AEG. REI did not invite ECA to the briefing.

Following that meeting, on November 4, 1985, Dr. Kurt Scheidhauer, Vice President, Sorting and Distribution Systems, AEG Telefunken (AEG), reported that he and Dr. E. Leopold Dieck, AEG's President, Information Systems Division, had received an offer from William G. Moore, Jr., President and Chief Executive Officer of REI, to split the contract for the procurement of MLOCR's between REI and ECA/AEG. On November 6, 1985, Inspectors interviewed Dr. Scheidhauer, who alleged that Mr. Moore made the offer in the presence of Robert W. Reedy, REI Vice President, Marketing, and Frank W. Bray, REI Manager, Postal Programs, during the October 17, 1985, meeting at REI's plant in Irving, TX.

Drs. Dieck and Scheidhauer interpreted the offer by REI as a violation of the competition test agreement and, if consummated, possibly a violation of United States law. Dr. Scheidhauer stated that he rejected REI's offer. He further related how during the meeting with REI officials, which was scheduled to be a technical meeting regarding the interfaces between the ECA/AEG Phase II machine, no technical issues were discussed in depth. Dr. Scheidhauer described the meeting as a lecture by William G. Moore, Jr., wherein Moore touted REI's political clout and support by the USPS Governors.

Dr. Dieck confirmed the statements of Dr. Schiedhauer and added that Mr. Moore said the USPS Governors had visited the REI plant and were impressed with the REI

product. The AEG officials alleged that Moore attempted to convince them that the best ECA/AEG could do was to accept the conversion (retrofit) project (Phase IIA), and if AEG did not "play ball," the conversion project would be killed. Drs. Dieck and Scheidhauer were so upset by the REI position and the implied threats that they visited the German embassy in Washington, DC to discuss the potential ramifications with embassy personnel. Dr. Scheidhauer furnished the Inspectors copies of the notes he took during the meeting at REI.

On November 12, 1985, Chief Inspector Clauson received an unusual phone call from Peter Voss. Mr. Voss asked Mr. Clauson if Postal Inspector tapped telephones. The Chief Inspector responded that the Inspection Service requested wire taps through the Department of Justice, as warranted. Mr. Voss also asked if the Inspection Service opened mail. Mr. Voss said he heard the Inspection Service was using mail covers in Ohio. The Chief Inspector advised Mr. Voss that mail cover procedures allowed only the recording of address information. Mr. Clauson told Mr. Voss that mail could not be opened without a federal search warrant. Mr. Voss also asked how much money a Postal Inspector made as compared to an FBI agent. The phone call was most unusual in that Governor Voss had very limited contact with the Chief Inspector before that date.

On November 19-20, 1985, Inspectors traveled to Irving, TX to interview REI officials regarding the allegations of Drs. Dieck and Scheidhauer. In interviews Frank Bray, Robert Reedy, and William Moore, Jr., reiterated the REI position on multi-line procurement issues. Moore denied he intended to initiate any contract splitting deal with ECA/AEG. He stated he was only repeating advice he fur-

nished William Chapp and other postal officials when asked what he would do if he were Postmaster General. Mr. Moore stated that he offered the same advice when testifying before Congress. Moore added that Postmaster General Carlin was "in the way" of REI obtaining a MLOCR contract.

Postal officials interviewed following that meeting maintained that they had never initiated any conversation which would prompt Mr. Moore's statements about splitting the contract. Preliminary conversations were held with attorneys in the Department of Justice who encourage the Inspection Service to continue to monitor the procurement process and attempt to obtain additional information.

Daniel J. Harrington, Special Assistant to the Chief Inspector, was assigned to direct the task force. Inspector Frank W. Kormann, Fraud Specialist, Washington Division, and Pierce B. McIntosh, Special Investigations Division, were added to the task force and directed to proceed on the investigation full-time.

Over the next several weeks, volumes of correspondence, proposals, testimony before Congress and reports of the General Accounting Office and Office of Technology Assessment were reviewed and analyzed. To obtain additional background information, initial interviews were conducted with Governors Camp, Peters, and Voss at the time of the December 1985 Board of Governors meeting. As a result of the document review and interviews, major questions were identified for the task force to resolve. Why did REI need a "proposal consultant" (GAI) from Michigan to present its case to the USPS Board of Governors when they already retained a Washington firm, Hill &

Knowlton? What was the relationship between GAI and members of the Board of Governors? It had been noted that phaseology used by REI in its past presentations had appeared *verbatim* in materials presented to the full Board of Governors and to USPS management by the Technology and Development Committee. Further, it was established that material presented over the signature of Governor Ruth Peters contained information which she was not able to articulate during meetings with USPS managers. It was speculated materials was being prepared for her by Governor Voss, his staff assistant, Sharon Peterson, REI, and/or GAI.

During this time, it became known that John Gnau and Peter Voss had been acquainted for several years through activities in Republican Party politics in Michigan and Ohio. It was learned they were early supporters of Ronald Reagan and worked to support his candidacy in 1976 and 1980. Review of correspondence in the file indicated some intriguing inconsistencies. For example, Peter Voss, an outspoken and ardent supporter of the immediate sole source procurement of MLOCRs from REI, did not appear on the distribution list of material sent to other members of the Technology and Development Committee by GAI.

By early December 1985, the investigation disclosed the suspicious nature of Voss' claims for reimbursement of administrative and travel expenses. Sharon Peterson, an officer of Voss' closely held Ohio corporation, was paid $600 per month by the Board of Governors on a regular basis.

On December 13, 1985, Postal Inspector David H. Smith, Manager of the Inspector Service Career Development Branch, Potomac, MD, was returning from New York to

Washington, DC on Inspection Service business. At that time, he was unaware of this investigation. He happened to take a seat on the train next to a young woman who, upon learning that Smith was a Postal Service employee, advised him she knew that Postmaster General Paul Carlin would be fired by the Board of Governors at the upcoming January 1986 meeting. She added that the Postal Service would soon purchase multi-line optical character readers from REI. She also described in some detail to Inspector Smith some of the politics behind the procurement of MLOCRs.

After Smith arrived in Washington, he relayed this information to the Chief Inspector who referred him to the task force. Through the description provided by Inspector Smith, the task force identified the young woman as Midge Gnau, the daughter of John R. Gnau of GAI. When Midge Gnau's prediction came true on January 7, 1986, it became became obvious to the task force there was a close, continuous connection between the USPS Governors and REI's consultant. Peter Voss was the logical connection between the Governors and Gnau/REI.

In order to be certain every available piece of evidence was captured, the task force embarked on an ambitious program of thorough interviews with every postal manager who had any connection with multi-line procurement. Each Senior Assistant Postmaster General who participated in the July 3, 1985, CIC meeting, senior and mid-level managers in the Engineering and Technical Support Department, Procurement and Supply Department, and postal managers who had attended USPS Board of Governors closed sessions wherein MLOCRs were discussed, were interviewed.

The task force also learned that GAI and a firm called MSL International Consultants, Ltd. (MSL) shared the same President, William A. Spartin. This knowledge proved invaluable when the task force later learned that MSL was awarded that executive recruitment contract to replace then Postmaster General Paul N. Carlin.

The summary dismissal of Paul Carlin on January 6 and the installation of Albert V. Casey as Postmaster General on January 7, 1986, spurred further efforts to discover other connections between REI and the Technology and Development Committee. Inspectors on the task force knew Mr. Casey's successor at American Airlines, Robert Crandall, was a member of REI's Board of Directors. News articles appeared in Dallas newspaper, wherein William G. Moore, Jr. was quoted as saying appointment of Albert Casey would assist REI in its attempts to win a MLOCR order from the USPS. Another article discussed indications of unusual REI stock activity on and about the dates of significant REI and MLOCR related USPS Board of Governors activity.

Shortly after Albert V. Casey was appointed Postmaster General, Senior Assistant Postmaster General James V. Jellison chose to retire on discontinued service rather than accept a demotion and transfer. In addition, other USPS managers known to have been looked upon with disfavor by Peter Voss and other Governors were moved from their positions of responsibility in the USPS. Among them were Senior Assistant Postmaster General William Cummings and Assistant Postmasters General Karen Uemoto and Mary Layton. Some Postal managers expressed concern about their future in the organization and some tied their future on relationships with Governor Voss. It appeared that Mr. Casey had not been in the job long enough to

evaluate individual capabilities before making personnel changes.

On February 5, 1986, Postmaster General Casey and John McKean, Chairman, USPS Board of Governors, appeared at a joint oversight hearing of the Subcommittee on Postal Operations and Services, and the Subcommittee on Postal Personnel and Modernization, chaired by Mickey Leland. In response to questions asked by members of the committee, Chairman McKean indicated Albert Casey was recruited by MSL. He also advised the committee the Washington public relations firm of Miner & Fraser had been hired by the Board of Governors to handle the public relations chores incident to Mr. Casey's appointment, because of a fear of leaks to the media if USPS personnel prepared the materials.

The disclosure by Chairman McKean that MSL had recruited Albert Casey struck an immediate chord with the task force members in attendance at the hearing. The fact that William A. Spartin was President of GAI and MSL appeared to create a conflict between finding the candidate who best served the interest of the USPS or REI, GAI's biggest client. After the hearing, Inspectors visited 1250 I Street, NW, Washington, DC. The building directory in the lobby at 1250 I Street listed GAI, Miner & Fraser and MSL (Spartin's firm) as tenants in suite 600. The Inspectors noted that behind the receptionist's counter in big gold letters were the names of two tenants at suite 600: GAI and Miner & Fraser Public Affairs. The Inspectors visited 1110 Vermont Avenue, NW, Washington, DC. GAI letterhead listed the Vermont Avenue address as its Washington headquarters, but the Inspectors instead found the offices of MSL. Subsequent contact with the letter carriers serving the addresses confirmed the fact that

mail for Miner & Fraser, GAI, and MSL was received at 1250 I Street, suite 600. The connection between William A. Spartin, GAI, and Miner and Fraser was confirmed.

The discovery of the relationship between MSL/William Spartin and John Gnau, together with the consulting arrangement between Gnau and REI, caused, a fundamental shift in the method by which the investigation was conducted.

On February 24, 1986, the Chief Inspector personally met with the U. S. Attorney for the District of Columbia, Joseph DiGenova, and his staff, and presented information gathered to date. In presenting the matter to the U. S. Attorney, the Chief Inspector advised that activity of one of the vendors (REI), their consultants (GAI), and two members of the USPS Board of Governors (Ruth Peters and Peter Voss), suggested possible conflict of interest, misrepresentation, and a scheme to defraud the United States Postal Service of the loyal and faithful services of its officers, including the opportunity to make factual, unbiased for the initiation of a grand jury investigation, thereby affording Postal Inspectors and the grand jury the opportunity to subpoena and review telephone, bank, and business records which could identify a pattern of illegal contact and financial interests. Mr. DiGenova authorized the prosecution to proceed under the direction of Mr. Stephen Spivack, Chief of the Special Prosecution Section. Mr. Spivack assigned Assistant U. S. Attorney E. Lawrence Barcella as the prosecuting attorney.

On the same date, Inspector Edwards, at the request of the Chief Postal Inspector, attended a meeting of the Technology and Development Committee at Sarasota, FL. During travel Washington, DC to Sarasota on Sunday,

February 23, 1986, Inspector Edwards observed Governor Voss flying in the coach section of a Presidential Airways flight which landed at Sarasota. The next day, while at lunch with all meeting participants, there was a discussion of airline service into Sarasota. Someone mentioned that Presidential Airways had just begun service into Sarasota. Mr. Voss said he had never flown on Presidential Airlines.

The Technology and Development Committee meeting was held at Sarasota, FL, at the request of Chairman Ruth Peters. In preparation for the meeting, she asked David Harris, Secretary to the Board of Governors, to photocopy excerpts from the committee's multi-line procurement file and send them to her. In going through the file, Secretary Harris allegedly noticed a letter dated March 12, 1985, on GAI's letterhead addressed to Ruth Peters. The GAI letterhead listed William A. Spartin as President. Mr. Harris knew that William Spartin was also President of MSL and immediately notified Chairman McKean and Governor John Ryan. Chairman McKean notified Board counsel Joseph A. Califano. After joint discussions, Harris, Califano, Ryan and McKean agreed that no other mention of this discovery would be made until it could be announced to the Board on March 3, 1986 when the Board members' reactions would be tape recorded.

The Chief Inspector, while closely monitoring the progress of the investigation, named David H. Smith, Manager of the Inspection Service Career Development Branch Instructor and computer specialist, was added to the task force by Inspector Smith.

Inspectors began a series of interviews with Postmaster General Casey, William A. Spartin, Board Secretary

David Harris, and Board Chairman John McKean surrounding the Spartin conflict of interest issue. This rapidly evolved into an examination of the entire circumstances surrounding the removal of Mr. Carlin and the selection and appointment of Mr. Casey.

A request was made to the USPS Board of Governors for access to tape recordings of their closed sessions. The Board, through their attorneys, Dewey, Ballantine, Bushby, Palmer and Wood, declined to allow Inspectors immediate access to those Postal Service records. They cited their concern over release of sensitive and confidential matters discussed by the Board of Governors at their sessions. At that time, the Board of Governors' attorneys also represented Peter Voss and were attending all interviews of Board members by Inspectors. Negotiations to reach a solution acceptable to both parties failed, and Inspectors obtained a grand jury subpoena for the records.

Inspector Edwards' observations, coupled with the review of Board of the Governors' travel vouchers and business records, disclosed that beginning with his second claim on September 3, 1982, Peter E. Voss had submitted vouchers containing false claims for travel and administrative expenses. Eighty-one instances were identified wherein he falsified the amount claimed for air travel. He received $70,022.51 when his actual expenditures totaled $26,204.54. Information was also developed that Governor Voss included numerous instances wherein he not only stole the difference between first class and coach fare for official travel, but also lied about his itinerary and billed the Postal Service for longer travel segments than he actually made. For instance, he would show first class travel from Chicago, Dallas, or Miami to Washington, DC, when he was actually leaving from his residence (Canton,

OH) and traveling coach class from Cleveland to Washington, DC. The investigation further disclosed that Voss billed the USPS for Sharon Peterson's services at a rate nearly double her actual salary at Decision Systems, Inc., and pocketed the difference.

Travel, telephone, and financial data were computerized for comprehensive analysis. Analysis of telephone records obtained independent of the investigative grand jury demonstrated patterns of contact between GAI, Ruth Peters, Peter Voss, and William Spartin. Several series of phone calls in chronological sequence could be tied to actions taken by the principals in furtherance of their scheme to influence the Postal Service procurement of MLOCRs.

Governor Voss' and GAI's actions, with Governor Peters' cooperation, guaranteed REI officials unlimited access to the Board of Governors and senior USPS officials. Their actions maneuvered REI into position for the receipt of a $250 million to $400 million MLOCR contract.

The investigation further disclosed that Voss had maneuvered William A. Spartin into a position of respect with the highest officials of the Postal Service. Voss introduced Spartin to then Postmaster General Paul Carlin, who utilized Spartin to recruit high level officials. Voss encouraged meetings between Spartin and Deputy Postmaster General Jackie Strange. Their meetings enabled Spartin to gain valuable insight into various management procedures and initiatives. Voss introduced Spartan to Board of Governors Chairman John McKean, who ultimately hired Spartin to recruit a new Postmaster General to replace Carlin. Voss failed to disclosed to Carlin, Strange, or McKean that Spartin was President of GAI, a consultant for REI on the MLOCR procurment.

Peter Voss also failed to disclose his financial interest in the MLOCR procurement and motivation for removing Paul Carlin, an obstacle to a sole source procurement award to REI.

Analysis of telephone and business records obtained by other that subpoena raised additional questions which resulted in another round of interviews with senior postal managers, members of the Technology and Development Committee, Chairman McKean, Sharon Peterson, and representatives of GAI, MSL, ECA, REI, and Miner and Fraser.

Assistant U. S. Attorney E. Lawrence Barcella engaged in negotiations with attorneys retained by the subjects of the investigation. Faced with the evidence, Peter Voss decided to enter a guilty plea. Mr. Voss subsequently entered a plea of guilty to a three count information on May 30, 1986. During June 1986, E. Lawrence Barcella left the U.S. Attorney's Office and accepted a position in private practice. Stephen R. Spivack assigned Assistant U. S. Attorney Joseph B. Valder to oversee the investigation and prosecute Voss' co-conspirators.

The nature of these continuing interviews and the information developed is still subject to the secrecy provisions of Rule 6(e) which covers information developed by use of grand jury subpoenas. The investigation is continuing as new investigative leads are developed. Prosecution of additional defendants is in progress, and further criminal penalties are anticipated. The facts developed independent of the grand jury are detailed below.

Details of the Scheme

In or about January 1984, Peter Voss and John R. Gnau, Jr. agreed that Voss would furnish Gnau inside USPS information and leads to companies seeking to do business with the USPS. Messrs, Voss and Gnau further agreed that Gnau would pay Voss 30% of all revenues Gnau realized as a result of Voss' referrals and official influence. Voss also guaranteed Gnau access to high level USPS officials. Shortly thereafter, Gnau introduced Voss to Michael B. Marcus and advised Marcus of their agreement. Marcus agreed to participate by lending technical expertise to the USPS—related projects steered to Gnau by Voss. During the latter part of 1984, Gnau and Marcus began doing business under the name Gnau and Associates, Inc. (GAI). William A. Spartin, a business acquaintance of Gnau and Marcus, became the President of GAI.

During August 1984, one month following the Phase II SLOCR award to ECA, and Governor Peters' signed support of Phase II automation strategy (single-line) (79-036), Peter Voss encouraged Governors Ruth Peters and George Camp of the Board of Governors Technology and Development Committee to visit the REI plant and the Dallas, TX Post Office to observe REI's prototype MLOCR. By this time, Peter Voss' executive assistant, Sharon Peterson, was already communicating frequently with Congressman Frost's office to assist REI, and Voss had identified REI as a potential GAI client.

Governor Peters agreed, and the Dallas TX Post Office was visited. However, the visit to the REI plant was cancelled at the request of then Postmaster General William F. Bolger when REI filed a patent infringement suit against

the USPS. Peter Voss, however, met privately with Robert Reedy, REI Vice President of Marketing, incident to the Governors' visit to Dallas. During the meeting, Governor Voss recommended to Robert Reedy that REI retain GAI in its efforts to: (1) convince the USPS to deploy MLOCRs; and (2) convince the USPS to purchase those MLOCRs from REI.

During this same time period, Peter Voss identified Paul N. Carlin, then a Regional Postmaster General, as his candidate for Postmaster General. There is evidence that prior to promoting Carlin for Postmaster General, Voss himself sought the position. Voss had already introduced Gnau to Carlin during January 1984, pursuant to Gnau's representation of a client that wished to sell Chicago real estate to the USPS. During the fall of 1984, when Carlin's appointment appeared imminent, Voss and Gnau embarked on a scheme to obligate Carlin to Gnau. Voss arranged for Carlin to overhear a telephone conversation between himself and Gnau. Mr. Carlin was led to believe the conversation was spontaneous and that Gnau did not know that Carlin was listening. During the rehearsed dialogue, Gnau and Voss discussed how Gnau cleared "political underbrush" at the White House, thereby paving the way for Carlin's appointment as Postmaster General. Gnau and Voss have since admitted that the entire conversation was untrue and calculated to aid GAI clients in obtaining USPS contracts following Carlin's appointment.

Following Voss' recommendation that REI hire GAI, REI and GAI negotiated for several months before reaching a compensation agreement. The negotiation process was accelerated on or about January 2, 1985, when at the direction of Peter Voss, then Postmaster General Paul N. Carlin agreed to meet with John R. Gnau, Jr., and

Michael Marcus on January 11, 1985, relative to GAI's represenatation of REI. Gnau and Marcus attempted to convince Mr. Carlin to move the USPS to a multi-line configuration and to purchase MLOCRs from REI. Mr. Gnau anticipated that Mr. Carlin would be very receptive to Gnau's request because of the staged telephone conversation and Voss' overwhelming support for Carlin in gaining his appointment as Postmaster General. Messrs, Gnau and Marcus were surprised by Carlin's grasp of the single-line versus multi-line issue and his support of management's current single-line approach and multi-line retrofit fallback position.

Effective January 15, 1985, REI entered an agreement with GAI wherein GAI, for an initial consulting fee of $30,000 paid in $10,000 installments on January 15, February 15 and March 15, 1985, would assist REI in pursuing a contract with the USPS for the purchase of production MLOCR systems. REI further agreed that upon the award of such a contract to REI by the USPS, REI would pay GAI an additional fee of 1% of the contract price, less the $30,000 initial fee.

Peter Voss, John Gnau, William Spartin, and Michael Marcus agreed to share equally in the proceeds of the 1% contingency fee if a contract was awarded to REI. Peter Voss received 30% ($9,000) of the initial $30,000 fee in the form of checks made payable to Decision Systems Inc., Peter Voss' closely held Ohio corporation. Following their agreement and continuing through March 1986, Voss, Gnau, Spartin, and Marcus met and held frequent telephone conversations relative to their agreement and discussed Peter Voss' official actions and influence which assisted REI.

Voss, Gnau, and Marcus decided to set their sights on the Technology and Development Committee. Voss had maneuvered himself into an assignment on that Committee by volunteering to assist Ruth Peters and touting his alleged technical background as President of Midland Engineering, Inc.

Following the Gnau, Marcus, and Carlin meeting, Voss tactfully set the stage for Michael Marcus to telephone Ruth Peters and arrange an REI presentation to the Technology and Development Committee and to pitch Ruth Peters on MLOCR technology. Voss was careful not to disclose to Peters that he knew Michael Marcus. Ruth Peters agreed to schedule a March 5, 1985, presentation by REI. During this presentation, Voss asked Ruth Peters to introduce him (Voss) to Marcus.

During January 1985, USPS management was prepared to award research and development contracts to SLOCR manufacturers (Pitney Bowes, Burroughs, and ECA) to develop multi-line reading capability for their respective SLOCRs. REI was not a candidate for these developmental contracts. During January 1985, at Governors Peters' and Voss' request, management delayed awarding these contracts. The contracts did not require Board of Governors approval, and Governor Peters had previously indicated her support of this program on July 10, 1984, when she supported the USPS Phase II automation strategy.

Peter Voss arranged for William Spartin to meet then Postmaster General Paul N. Carlin on January 15, 1985. Spartin introduced himself as Managing Director of MSL, an executive recruitment firm affiliated with the Hay Group. Voss, Gnau, Marcus, and Spartin agreed to con-

ceal Spartin's affiliation with GAI and REI from Mr. Carlin and the USPS.

Spartin pitched MSL to Mr. Carlin as a search firm capable of filling vacancies in high level USPS management as well as outplacing departing USPS executives. Mr. Carlin used MSL and William Spartin for recruitment and outplacement during 1985.

At approximately the same time, Voss introduced Spartin to USPS Board of Governors Chairman John R. McKean and discussed with McKean the possibility of additional directorship positions. In turn, Spartin sought approval for a USPS organizational study by MSL's parent firm, the Hay Group, and executive recruitment assignments for the USPS. There is evidence that Spartin ultimately sought to fill vacant Postal Service positions with individuals who could assist GAI efforts to represent potential Postal Service vendors, including REI.

On February 5, 1985, the USPS Board of Governors adopted a resolution that formally established the makeup and function of its committees. At this time Governor Voss was formally assigned to membership on the Board of Governors Technology and Development Committee that was chaired by Governor Peters. The February 5, 1985, Board of Governors resolution described the function of its committees as follows (79-037):

> Each committee of the Board is authorized to gather information on behalf of the Board and report to the Board concerning this information, but is *not authorized to take action on behalf of the Board* (emphasis added). The Technology and Development Committee shall assist the

> Board in considering policies and issues that merit the attention of the Board...

At the same time, Peter Voss was able to maneuver his candidate for Deputy Postmaster General, Jackie A. Strange, into the position. Incident to this investigation, Mr. Carlin stated that Senior Assistant Postmaster General James Jellison was his first choice for the position of Deputy Postmaster General. Mr. Voss later introduced William Spartin to Ms. Strange for the same purpose he introduced Spartin to McKean and Carlin.

On March 5, 1985, REI made the first of five known presentations to the Technology and Development Committee and selected USPS managers. Following the presentation, Governor Peters, Voss and Board Secretary Harris met with Chairman McKean at McKean's suite at the Loews L'Enfant Plaza Hotel. Governor Peters, at the encouragement of Governor Voss and with the consent of Board of Governors Chairman John McKean, then instructed Deputy Postmaster General Jackie A. Strange, management's representative on the Technology and Development Committee, to "freeze" any procurement action with Pitney Bowes, Burroughs, and ECA to convert SLOCRs to multi-line capability (79-038). George Camp, the third member of the Board's Technology and Development Committee, was not present with Voss and Peters when they with Chairman McKean. Mr Camp, who was also the Board's Vice Chairman, was unaware of Voss' and Peters' actions in this regard. Governor Peters' policy direction which was made outside of the Board of Governors forum was followed by USPS management, without the apparent knowledge or consent of the remaining members of the Board of Governors. It should be noted that the Office of Technology and Assessment (OTA)

reported that retrofitting SLOCRs to multi-line capability was feasible. Peter Voss, however, referred to his "CEO experience" at Midland Engineering and declared that retrofitting was not feasible. Governor Peters, with the advice of GAI consultant Michael Marcus, supported Voss' "finding."

On March 11, 1985, following Governor Peters directive, REI amended the January 15, 1985, REI/GAI agreement to authorize GAI to assist REI in pursuing a contract to produce multi-line adapter kits to convert Phase I (Pitney Bowes and Burroughs SLOCRs to multi-line reading capability. Thus, GAI expanded its eligibility for the 1% commission to include both single-line conversion kits and production multi-line machines.

Beginning in March/April 1985, Governor Ruth Peters and Michael Marcus held frequent telephone conversations wherein Marcus and Peters discussed internal USPS activities relative to the automation program. Marcus advised Governor Peters on how to proceed on the USPS automation effort. Governor Peters initially believed Michael Marcus was an REI employee, but eventually realized he was a consultant to REI. During April and May 1985, the Technology and Development Committee visited the REI plant in Dallas, TX on two occasions.

Michael Marcus, Peter Voss, and Sharon Peterson played on Ruth Peters' dislike of Paul Carlin and general distrust of USPS management by sharing inside USPS events and information of which Ms. Peters was unaware. Michael Marcus would advise Governor Peters of this information during their telephone conversations, thirty-one (31) of which were charged to Governor Peters' Board of Governors calling card account. Marcus was able to heighten

Peters' distrust of ECA, REI's chief competitor. Peter Voss and Sharon Peterson corrobated and set the stage for future Marcus calls during their near daily telephone conversations with Peters, approximately 125 of which were charged to Governor Peters' Boards of Governors calling card account.

During April 1985, Peter Voss furnished Michael Marcus of GAI, an internal memorandum prepared by Jackie Strange which expressed management's views on automation. Michael Marcus prepared for Peter Voss a rebuttal to management's views, along with recommendations for USPS management, which included the immediate acquisition of MLOCRs from REI. Ruth Peters, at Peter Voss' request, attached Marcus' recommendations to a May 5, 1985, memorandum for the Board of Governors which was signed by Technology and Development Committee members Peters, Voss and Camp. Governor Peters told investigating Inspector that she believed the highly technical and pre-REI attachment was prepared by Voss and Sharon Peterson. The Technology and Development Committee, in effect, adopted wholly the recommendations of REI's consultant. Knowingly (Voss) or unknowingly (Peters and Camp), the committee members misrepresented to the remaining members of the Board of Governors and USPS management that the content of the report was the independent work and ideas of the Technology and Development Committee (79-39).

The May 5, 1985, Technology and Development Committee memorandum authored by REI consultant Michael B. Marcus, became the vehicle for the July 1985 "mid-course correction" from a single-line to a multi-line configuration. Convinced that Voss and Peters were supported by the remaining Governors, Deputy Postmaster General

Jackie Strange assembled several task forces to analyze and respond to the memorandum. The task forces worked day night, seven days a week, to respond in a manner which would be accepted by Governors Voss and Peters. As a result of the bias and sense related economic analyses conducted by Postal Service management did not include a thorough review of all alternatives. Phases IIA and III were hastily developed during July 1985 under similar constraints and pressures.

During May, June, and July 1985, Ruth Peters and Peter Voss continued to converse frequently with Michael Marcus and John R. Gnau of GAI. Marcus quickly established and excellent rapport with Governor Peters. There is evidence that Ruth Peters began furnishing Marcus the content of closed Board of Governors meetings, especially those matters related to the USPS automation program. There is also evidence that Governor Peters shared with Michael Marcus ECA's responses to the USPS relative to the pricing and delivery of MLOCRs and retrofit kits. Mr. Marcus used these revelations for the benefit of REI.

Marcus furnished Governors Voss and Peters with recommendations for management and prepared opening statements for their testimony before Congress. Governors Peters and Voss wholly adopted Marcus' recommendation, including a draft response to a question asked the Board of Governor by Congressman Mickey Leland. During this period, Governor Peters discussed with both Deputy Postmaster General Jackie Strange and Michael Marcus, her (Peters') desire to retain Marcus as a consultant to the Technology and Development Committee.

In or about June 1985, Governor Peters instructed Gerald Rosberg, outside counsel for the Board of Governors, to

review the 1980 REI MLOCR prototype and current ECA SLOCR contracts and determine if: (1) the REI contract could be reopened and amended to execute an additional purchase of MLOCR systems without calling the award a "sole source," and (2) the SLOCR contract with ECA could be terminated.

On June 14, 1985, Governors Voss and Peters, without the alleged knowledge or consent of Governors Camp and the remaining Governors, instructed Deputy Postmaster General Strange to award REI a sole source contract for the production of 90 MLOCR systems for an aggregate price of approximately $162 million. Governors Voss and Peters misrepresented to Strange that the award was favored by the entire Board of Governors. They further represented that the unused portion ($163 million) of the Board of Governors' approved budget for Phase II could cover the award (79-040).

On or about June 21, 1985, Governor Peters reported to Deputy Postmaster General Strange that REI was excited about the award directed by Governors Voss and herself. Governor Peters directed Ms. Strange to submit a request for funds to purchase multi-line readers at the next Board of Governors meeting (79-041).

On or about June 25, 1985, after reportedly learning the legal ramifications of hers and Voss' actions, Governor Peters withdrew her June 21, 1985, instruction. Governor Peters remarked to Deputy Postmaster General Strange that "Peter will get me in trouble."

On or about July 2, 1985, Deputy Postmaster General Strange presented Governors Voss and Peters with a decision analysis report prepared by USPS management which did not favor: (1) a sole source award; or (2) the procure-

ment of 90 to 100 MLOCR systems, as instructed by Governors Voss and Peters. Management advised the Governors the existing REI prototypes did not include state of the art components, and it would not be in the best interest of the USPS to immediately award a contract to REI. Governor Voss, with Governor Peters observing, again instructed Deputy Postmaster General Strange to proceed as directed. She complied with Voss' request by advising the CIC of the expressed wishes of Voss and Peters through the Acting SAPMG for Administration. The CIC returned the Decision Analysis Report to the Finance Department for validation.

There is evidence that in or about June/July 1985, Ruth Peters requested that Michael Marcus furnish her specifications for her planned USPS Request For Proposal (RFP) for a MLOCR production contract. Governor Peters indicated that the Technology and Development Committee would guide the procurement. Michael Marcus and REI complied with Governor Peters' request and furnished Governor Peters specifications for dual transport MLOCRs (a design unique to REI equipment).

On or about July 8, 1985, Governors Voss and Peters, assisted by Board of Governors counsel, presented a revised plan for purchasing MLOCRs (79-042). The plan called for an expedited evaluation and award based on written proposals and specifications, and not a release loan test (competitive fly-off) favored by USPS management. The plan also call for the purchase of "dual" transport MLOCRs. ("Dual" transport is an unique REI design.) There is evidence that the plan was an excerpt of the materials furnished Governor Peters by Michael Marcus. When interviewed, Board of Governors Counsel Rosberg stated that to his knowledge, the dual transport configura-

tion, was not inserted to aid REI. Regardless, the remaining Governors did not support Voss and Peters and recommended that the procurement process remain the responsibility of management.

On July 9, 1985, Governor Peters, as chairman of the Technology and Development Committee, and accompanied by Governor Voss, misrepresented hers and Mr. Voss' previous actions by testifying before Congress as follows (79-043):

> It is not the responsibility of the Board to make procurement decisions or choose one vendor over another. I can assure you, however, that the **Postal Service will carefully examine every available option and make the choice on the basis of a competitive procurement process.**

On or about July 10, 1985, a majority of the Governors agreed that it was a responsibility of management to implement a program to procure MLOCRs. Shortly following the meeting, Governors Peters and Voss, in the presence of Board of Governors Counsel Gerald Rosberg, discussed the Technology and Development Committee's retention of an outside, independent consultant to help draft specifications for the MLOCR solicitation. Ruth Peters immediately arranged a meeting with Terry Miller, President, Government Sales Consultants Inc., at the Board of Governors conference room. Following this meeting, Mr. Rosberg asked both Voss and Peters individually where Governor Peters came up with Miller's name. Following Voss' alleged ignorance, Governor Peters acknowledged that she received Miller's name from Michael Marcus. Mr. Rosberg then notified Mr. Miller that he (Miller) could not be retained by the Board of

Governors. Mr. Rosberg stated that he counseled both Governors Peters and Voss on this and other occasions of the impropiety of appearance of impropriety in their frequent dealings with Michael Marcus. The investigation has disclosed that Terry Miller, trading as Government Sales Consultants Inc., was a paid REI consultant prior to and during the July 10, 1985, meeting, and a personal acquaintance of REI Chief Executive Officer William Moore for the past 10 years.

During July 1985, it became apparent to Voss, Gnau, Marcus, and Spartin that Paul Carlin was not going to award a sole source contract to REI despite the relentless pressure applied to Carlin and Strange by Voss and Peters. Mr. Carlin remarked to investigators that the Board Chairman, John McKean, allowed Governors Peters and Voss to put the single-line versus multi-line issue on the Board of Governors' agenda on a monthly basis. Voss, at the insistence of GAI, pressured Carlin to remove Senior Assistant Postmaster General Jellison, the strongest and most knowledgeable advocate of Phase II and SLOCRs. Partially as a result of this pressure, Mr. Carlin removed Deputy Postmaster General Strange and Senior Assistant Postmaster General Jellison from the automation decision making process, and assigned Assistant Postmaster General William Chapp. Postmaster General Carlin refused, however, to issue a sole source award and directed a competitive program managed by William Chapp.

At this time, Voss, Marcus, Gnau, and Spartin agreed that Mr. Carlin was their stumbling block to attaining an REI award and the resultant 1% commission. They plotted to remove Mr. Carlin. Voss knew he had an ardent advocate in Ruth Peters. One witness indicated that Governor

Peters vowed that she would not support Chairman McKean's reelection if he failed to remove Carlin and then Peters endorsed Peter Voss as the next Postmaster General. Gnau, Marcus, Voss, and Spartin agreed that Spartin and Voss would lobby Strange and McKean to make their plot a reality.

On or about July 25, 1985, Congressman Martin Frost proposed introduction of an amendment to a House Bill appropriating $961.12 million dollars to the USPS. The proposed Frost amendment would have placed a restriction on the release of funds to the USPS until the USPS awarded a contract for American designed technology meant a sole source award to REI. Congressman Frost announced he would not offer the amendment following criticism by Congressman William Ford on July 26, 1985.

During the August 1985 Board of Governors meeting at Anchorage, AK, a majority of the Board of Governors supported management's proposal to implement multi-line capability via a competitive release loan testing effort. Governors Peters and Voss voiced their dissatisfaction with management's proposal and favored an immediate award to REI. Governors Peters and Voss pressured management to establish an accelerated development and testing schedule which would not be funded by the USPS. Peter Voss and GAI believed this strategy would favor REI because of REI's existing multi-line capability and prior receipt of approximately $50 million of multi-line developmental funding from the USPS.

During June through September 1985, GAI continued to lobby on behalf of REI. Messrs, Gnau, Spartin, and Marcus negotiated a new agreement with REI during this period. On September 26, 1985, the January 15, 1985,

agreement was amended to included additional monthly fees of $16,000 and $6,000 for Gnau's continued assistance on the MLOCR contract and for general public relations activities, respectively. The combined $22,000 payments began during October 1985.

During the period August through December 1985, Governors Voss and Peters continued to receive recommendations and suggested testimony for Congressional hearings from Michael Marcus. Marcus' recommendations and rebuttal to management's comments were incorporated in Technology and Development Committee memoranda addressed to Postmaster General Paul Carlin (79-044). Governors Voss and Peters continued to pressure management to award a sole source contract to REI. In lieu of a sole source award, Governors Voss and Peters, with the support of Michael Marcus and GAI, continued throughout 1985 to testing schedule. Governor Peters told Mr. Carlin that REI had told her they were ready to test immediately.

Governors Voss and Peters pressured Paul Carlin to testify before Congressman English's Subcommittee on Government Information, Justice and Agriculture on October 23, 1985. Peter Voss lobbied Chairman McKean to order Carlin to testify. Counsel for the Board of Governors stated that McKean wrote Mr. Carlin a letter which indicated it was Carlin's decision. Counsel for the Board of Governors, Governor Peters, and Paul Carlin's met to discuss the matter. At that point, Governor Peters agreed that Carlin should not testify. Several hours later, after a conversation with Voss, Governor Peters returned to her position that Carlin should testify. Postmaster General Carlin declined to attend the hearing, in part due to Congressman English's known opposition to USPS ZIP + 4 ef-

forts and concern the Board would be pitted against management at the hearing.

During their October 23, 1985, testimony before Congressman English's committee, Governors Peters and Voss misrepresented the view of the Board of Governors when they testified that the Board of Governors Audit Committee supported a sole source award to REI. Additionally, Postmaster General Carlin's prediction of the content of the hearing was correct. During the hearing, Governors Voss and Peters openly questioned the competence and integrity of USPS managment relative to the automation (single-line versus multi-line) issue. Voss cited his independent research which this investigation disclosed was actually conducted by Michael Marcus, an REI consultant. There is also evidence that GAI furnished Congressman English's staff inside information obtained from Governors Voss and Peters. Congressman English praised Voss' and Peters' efforts, suggested the cancellation or a modification of the Phase II program, and talked of having "somebody's hide nailed to the barn door" over mismanagement of the USPS's automation program.

Governors Voss and Peters, armed with Carlin's failure to appear before the English Subcommittee hearing and English comments during that hearing, stepped up their campaign to remove Postmaster General Carlin. A Voss employee remarked that Voss did everything to undermine Paul Carlin except possibly hiring a detective to follow Carlin. Peter Voss also maneuvered William Spartin into position to obtain the executive recruitment contract for Carlin's replacement, and counseled Deputy Postmaster General Strange relative to her concerns about Mr. Carlin.

Peter Voss and John McKean interviewed RPMGs Fletcher Acord and John Mulligan; Voss and BOG Secretary David Harris interviewed RPMG Penttala and McKean interviewed RPMG Caraveo. These interviews were intended by Voss to solidify the perception that PMG Carlin had lost the confidence of top field managers and was incapable of managing the USPS, even though not all of the RPMGs were dissastified with Carlin.

Michael Marcus aided Voss' efforts by advising Ruth Peters that Mr. Carlin could not comprehend the multi-line issue. Governor Peters agreed by describing USPS managers as "clerk/carriers" lacking technical and engineering competence. Governor Peters blamed the lack of USPS technical expertise on Carlin's "axe wielding" style during early 1970's postal reorganization. Ruth Peters cited Carlin's ineffectiveness relative to the MLOCR prgram as justification for his removal and supported the appointment of Peter Voss as Carlin's replacement.

Beginning on or about October 18, 1985, and continuing through February 1986, William Spartin furnished Peter Voss airline tickets valued at approximately $4,300. The subject tickets, which were used for the personal travel of Peter Voss, his family and Board of Governors travel, were charged to William Spartin's MSL business account with a Maryland travel agency. The tickets represented Spartin's kickback to Voss for the USPS executives search work Voss steered to MSL.

On November 4, 1985, ECA and REI presented the status of their respective multi-line development efforts to the Technology and Development Committee, USPS procurement officials, and selected managers. There is evidence

that Peter Voss furnished REI materials presented by ECA and asked questions aimed at benefitting REI. During its presentation, REI remarked that it had declined a July 12, 1985 USPS offer of MLOCR developmental funding. Following the presentation, Governor Peters berated management for not informing her of the offer and declination. There is evidence that Governor Peters learned of the USPS offer and REI rejection outside of normal channels by July 16, 1985. Furthermore, this investigation disclosed that USPS management had indeed advised Governor Peters of the offer and declination in a July 25, 1985, memorandum, and that REI had furnished David Harris a copy of their letter which restated the USPS's offer and REI's rejection on or about July 17, 1985 (79-045). There is also evidence that REI rejected the USPS funding offers *would* be made by management and she would not approve MLOCR developmental funding.

During November and December 1985, Peter Voss received approximately $5,000 in the form of two cash payments from John R. Gnau as compensation for his official actions which assisted REI's efforts to obtain a USPS contract. The initial cash transfer occurred at a Toledo, OH restaurant. The second $2,500 cash payments was consummated during a meeting at the Cleveland, OH airport wherein Voss and Gnau discussed Spartin's nominee to replace Carlin as Postmaster General.

Peter Voss suggested to Board of Governors chairman John McKean that William Spartin, MSL International Consultants, Inc., be retained to conduct the search for Carlin's replacement. Chairman McKean and Governor Voss instructed Spartin to initiate the search for Carlin's replacement on or about December 2, 1985. On or about December 12, 1985, William Spartin discussed the search

for Carlin's replacement with GAI Chairman, John R. Gnau and REI's President, William Moore. Moore provided Spartin with the names of John Lawrence, Chester Nimitz, and Albert Casey. Moore suggested that Spartin recommend Albert V. Casey as the new Postmaster General. Spartin later advised Voss that he received Casey's name from William Moore and that he was recommending Casey's name to to John McKean.

On or about December 13 and 16, 1985, William Spartin and Board of Governors Secretary David Harris executed letter agreements detailing the nature of Spartin's assignment and the method of compensation. The December 13, 1985, contract represented the search for an interim Postmaster General, while the December 16, 1985, contract represented the search for a permanent Postmaster General. Governor Peters maintains that until immediately prior to the Board of Governors meeting on January 6, 1986, she was completely unaware of Voss' and McKean's December 1985 actions relative to the hiring of MSL, the decision to name an interim Postmaster General, the identification of Mr. Casey, and the decision to immediately replace Mr. Carlin. On January 7, 1986, the Board of Governors formally announced that Albert V. Casey would replace Paul N. Carlin as Postmaster General.

During January and February 1986, via private air express courier, Peter Voss received approximately $5,000 in the form of two equal cash payments from John R. Gnau as compensation for his official actions which assisted REI's effort to obtain a USPS contract.

Shortly following Casey's appointment, Senior Assistant Postmaster General James Jellison chose to retire, rather than accept demotion and transfer due to alleged "dif-

ferences" with Deputy Postmaster General Strange and the BOG. Incident to Jellison's removal, GAI renewed its attempts to secure a sole source award on behalf of REI. Governors Peters and Voss attacked management's September 1985 choice of Phoenix as a MLOCR test site. REI joined the attack aimed at the Phoenix test site, pursuant to meetings with Michael Coughlin, Jellison's replacement as Senior Assistant Postmaster General, Operations Group.

On or about January 10, 1986, Deputy Postmaster General Strange, awarded Miner and Fraser Public Affairs, Inc., a $19,000 contract to conduct a public relations audit of the USPS Communications Department. The audit followed Miner and Fraser's receipt and completion of a $18,000 contract to announce the appointment of Albert V. Casey and to issue opinion editorial releases publicizing the background, efforts and statements of Chairman McKean and newly elected Vice Chairman Peter E. Voss.

The contract award to Miner and Fraser followed William Spartin's recommendation to Chairman McKean that the USPS and Board of Governors hire Miner and Fraser on a retainer basis. Incident to the Miner and Fraser communications audit, Postmaster General Casey and Deputy Postmaster General Strange awarded Spartin (MSL) contracts to recruit three senior level USPS managers. Included in the three were a replacement for Mary Layton, Assistant Postmaster General, Communications Department, and a replacement for Michael Coughlin, former Senior Assistant Postmaster General, Employee and Labor Relations Group, who replaced James Jellison.

David Harris, Governor Peters' other candidate for Postmaster General, was interviewed by William A. Spar-

tin on or about December 27, 1985, at suite 600, 1250 I Street, NW, Washington, DC. Incident to the interview, Mr. Harris noted the GAI and Miner and Fraser signs at Suite 600 and so advised Chairman McKean. On or about January 20, 1986, David Harris notified Board of Governors Counsel Gerald Rosberg of this finding. Mr. Rosberg stated he was concerned about the connection between GAI and William Spartin and initiated his firm's investigation of a Spartin and GAI relationship. Neither Mr. Harris, Chairman McKean, or Gerald Rosberg notified the Chief Inspector of their findings, concerns, or inquiry.

On or about February 12, 1986, prior to finding any association via research, David Harris found a March 12, 1985, letter addressed to Governor Peters which listed William A. Spartin as the President of GAI. Mr. Rosberg, Chairman McKean and David Harris agreed not to advise Governor Voss or the remaining Governors of their findings until the March 3, 1986, Board of Governors meeting. This investigation disclosed, however, that Governor Ryan had already been notified.

The full Board of Governors discussed the Spartin situation in closed executive session for three hours on March 3, 1986. During this discussion, Peter Voss lied to his colleagues about the nature and extent of his relationship with John Gnau and William Spartin. Peter Voss denied any knowledge of Spartin's relationship with REI and GAI. Furthermore, Voss told the remaining Governors that after referring representatives of GAI to then Postmaster General Carlin, he had no contact with GAI. The Board decided by acclamation rather than vote to terminate Spartan's contract to find a permanent Postmaster General and recommended that Postmaster General Casey also cancel his contracts with Spartin. Mr. Casey had re-

tained Spartin to find three senior postal managers, two of whom were eventually accepted and placed.

On or about March 3, 1986, when confronted by Chairman McKean, William A. Spartin said he resigned from GAI on October 1, 1985. Spartin's denial of a current affiliation with GAI and REI touched off a cover-up which would included the participation of Peter E. Voss, John, R. Gnau, Jr. others. The cover-up continued until Peter E. Voss and others agreed to cooperate with Postal Inspectors.

On or about June 5, 1986, the United States Postal Service decided to suspend indefinitely its multi-line procurement program. On November 14, 1986, the Phase IIA and III of the MLOCR program were cancelled. The suspension and cancellation can be attributed primarily to Governors Voss' and Peters' actions on behalf of REI and Governor Voss' financial relationship with GAI.

On October 24, 1986, Federal District Court Judge George Revercomb sentenced Peter E. Voss to a four-year period of incarceration and an $11,000 fine. (79-046). Voss reported to the Loretto, PA Federal Correctional Institute on Monday, November 24, 1986, to begin his sentence. On October 23, 1986, John R. Gnau, Jr. pleaded guilty to paying Voss a gratuity and conspiracy charges for his role in defrauding the United States Postal Service of a fair and unbiased procurement. (79-047) On December 19, 1986, John R. Gnau, Jr., was sentenced to three years incarceration and a $10,000 fine. On January 20, 1987, Michael B. Marcus entered a guilty plea to a two-count criminal information charging him with aiding and abetting and paying illegal gratuities to Peter Voss. He is scheduled to be sentenced on March 10, 1987. The investigation is continuing.

No. 87-523

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL N. CARLIN, PETITIONER

v.

JOHN R. McKEAN, INDIVIDUALLY AND AS A MEMBER OF THE BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DOUGLAS N. LETTER
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the federal courts have jurisdiction to review the removal of the Postmaster General by the Board of Governors of the United States Postal Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 823 F.2d 620. The memorandum opinion of the district court (Pet. App. 17a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on July 17, 1987, and a rehearing petition with a suggestion for rehearing en banc was denied on September 25, 1987 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on September 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board of Governors of the United States Postal Service appointed petitioner Postmaster General on

January 1, 1985, and removed him from that position on January 6, 1986. Seven of the eight active Governors attended the meeting at which the Board voted to dismiss petitioner; six Governors voted to dismiss and one abstained. Petitioner alleges that the Governors removed him from office because he was impeding a corrupt scheme by two of the Governors to channel the award of a Postal Service contract to a bidder in return for kickbacks. Those two Governors, one of whom subsequently pleaded guilty to three felony counts related to the kickback scheme and was sentenced to four years' imprisonment (Pet. App. 18a-19a, 21a, 82a-83a, 124a), allegedly conspired to bring about petitioner's dismissal in order to replace him with a more pliable Postmaster General.

Petitioner filed suit in the United States District Court for the District of Columbia requesting that he be reinstated as Postmaster General following the scheduled August 15, 1986, resignation of his successor, Albert V. Casey. In addition to the United States Postal Service, petitioner named each of the members of the Board of Governors, individually and in his or her official capacity, as a defendant. Petitioner claimed, inter alia, that the decision to remove him was flawed because it was based on false information and was part of the kickback scheme. Pet. App. 17a, 21a-22a. On July 18, 1986, the district court held that the controversy was not justiciable and granted defendants' motion to dismiss (*id.* at 17a-31a). The Board of Governors subsequently appointed Preston R. Tisch, who continues to serve as Postmaster General, to succeed Postmaster General Casey.

In holding that it lacked jurisdiction, the district court relied primarily on 39 U.S.C. 202(c), which provides in full: "The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors." The court concluded

that, "[i]n vesting the Governors with the power of appointment and removal of the Postmaster General, Congress thus placed *no* limitations on this power in the Postal Act other than the requirement that such a decision be reached by 'a favorable vote of an absolute majority of the Governors in office.' " Pet. App. 24a-25a (emphasis in original) (quoting 39 U.S.C. 205(c)(1)). The court concluded that petitioner's "challenges to the Governors' decision must fail because there is no statutory or constitutional standard with which this court can evaluate their reasons for removing [petitioner] and * * * because we cannot compel the relief which he contends is due." Pet. App. 23a.

The court of appeals affirmed (Pet. App. 1a-11a). The court first concluded that the language of Section 202(c) "unmistakably vests the Governors with complete authority over the Postmaster's tenure and is ample indication that Congress intended to preclude judicial review of their decisions to appoint or remove any person in that post" (Pet. App. 6a). The court found further support (*ibid.*) for that reading of Section 202(c) by contrasting it with the language of other provisions of the Postal Reorganization Act of 1970, 39 U.S.C. (& Supp. III) 101 *et seq.* Under the Act, the governors, who are appointed by the President, serve nine-year terms and "may be removed only for cause." 39 U.S.C. (& Supp. III) 202(a) and (b). Similarly, Postal Service employees may be removed only following a "fair hearing" (39 U.S.C. 1001(b)) and, under 39 U.S.C. 1005(a), are covered by the provision of the civil service laws that provides that federal employees may be removed "only for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)). The Postmaster General, unlike the Governors, is not granted a fixed term and the statute does not provide that he may be removed only for cause. Further, the post is excepted from the provisions governing the discharge of employees (39 U.S.C. 1001(b),

1005(a)(3)), making it doubly clear that it is not necessary to establish cause for the removal of a Postmaster General.

The court of appeals also noted (Pet. App. 7a) that in *In re Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839), the Court concluded that "when the law does not fix a tenure of office or require any cause for removal from that office, the office 'must be held at the will and discretion of some department of the government, and subject to removal at pleasure.' " The court of appeals here concluded: "The President had complete authority to remove the Postmaster when that official was a Cabinet member. In reorganizing the Postal Service in 1970, and transferring this authority from the President to the Governors, Congress quite deliberately avoided any break with the historical understanding that the Postmaster serves only at the pleasure of his superiors." Pet. App. 7a-8a.

The court then responded to petitioner's argument that review is warranted because his discharge was caused by fraud and corruption. The court first concluded that the cases petitioner cited establishing an inherent authority of courts to deal with fraud were not relevant because they "all deal[t] with strictly financial matters" (Pet. App. 8a) and they all concerned a "power to revise a judgment that was obtained by * * * fraud" (*id.* at 9a). Moreover, the court concluded, any inherent common law authority to take jurisdiction to control fraud is plainly subject to Congress's modification, and "[h]ere Congress' intent to preclude review is sufficiently clear from the language, structure, and background of the statute that it does not lend itself to any such exception" (*id.* at 10a).

The court also rejected petitioner's argument that review is warranted to determine whether the discharge was made in compliance with Section 205(c)(1)'s requirement that a majority of active governors must vote to discharge a Postmaster General. Because the votes of two of the

Governors were allegedly inspired by fraud, petitioner argued that their votes should not be counted; if their votes are discounted, then only four of the eight active Governors voted to discharge. The court noted that "there is no question that a majority of the Governors then in office voted to discharge" petitioner (Pet. App. 10a), and concluded that, because petitioner actually seeks to question their motivations rather than their numbers, his argument is "an attempt to clothe in procedural guise a determination that goes to the merits" (*id.* at 10a-11a). Since it had held that there is no basis for review of the merits of petitioner's dismissal, the court held that it lacked jurisdiction to consider petitioner's "procedural" argument.

ARGUMENT

The courts below correctly concluded that they lacked jurisdiction to review petitioner's removal or to order his reinstatement. The court of appeals' decision, which is firmly grounded in the language of the Postal Reorganization Act of 1970 and accordingly has little general applicability, does not conflict with any decision of this Court or another court of appeals. Accordingly, there is no warrant for review by this Court.

The events surrounding petitioner's removal constitute a regrettable episode in the history of the Postal Service that has been examined by Congress, the Postal Service, and federal prosecutors. Hearings were conducted by a Committee of the House of Representatives. *Oversight Hearing on United States Postal Service Board of Governors: Hearing Before the House Comm. on Post Office and Civil Service,* 99th Cong., 2d Sess. (1986). The Board of Governors initiated reforms in response to the scandal, including the adoption of a Code of Ethics for Governors (*id.* at 63). And, as noted, the former Governor at the heart of the scandal pleaded guilty to criminal charges and was sentenced to four years' imprisonment (Pet. App.

124a). It does not follow, however, that petitioner should be reinstated as Postmaster General. That decision is committed to the unreviewable discretion of the Governors of the Postal Service by Section 202(c), and they have not decided to reappoint him.

Petitioner does not dispute that courts generally lack jurisdiction to review the removal of a Postmaster General. It is plain that there is no basis for review in the Postal Reorganization Act. In that Act, Congress in 1970 transferred the power to appoint and remove the Postmaster General, formerly held by the President, to the Governors of the Postal Service. As the court of appeals concluded, under Section 202(c) "[n]o qualifications whatever are attached to their exercise of these powers." Pet. App. 5a-6a. A comparison with other provisions of the Postal Reorganization Act demonstrates that the absence of any qualification is intentional, as the court of appeals also concluded (*id.* at 6a).

Petitioner contends (Pet. 10-17), nevertheless, that an exception based on *United States* v. *Arredondo,* 31 U.S. (6 Pet.) 691, 729 (1832), should be read into the statute to authorize judicial review in any case where the removal allegedly was fraudulently induced. There is no basis for such an exception. As the court of appeals concluded, neither *Arredondo* nor any other decision of this Court cited by petitioner (Pet. 10) holds that a court has jurisdiction to consider whether the removal of a federal employee was induced by fraud.[1] While no prior case is directly on

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[1] Indeed, of the eight decisions of this Court that petitioner cites in support of his fraud exception, only *Board of Governors* v. *Agnew,* 329 U.S. 441 (1947), involved the removal of a person from an office, and that person was not a federal employee. In *Agnew,* the Court concluded that an order of the Board of Governors of the Federal Reserve System removing directors of a national bank from office pursuant to the Banking Act of 1933 was reviewable. That case is plainly distinguishable from this one because the Banking Act provided for

point because none involved the removal of a Postmaster General pursuant to Section 202(c), the most relevant decision of this Court is *Hennen,* where the Court held that it lacked jurisdiction to review the removal of a federal "at will" employee. Moreover, since it is quite clear that "Congress intended affirmatively to preclude judicial review of the Governors' decisions to appoint and remove the Postmaster General" (Pet. App. 5a), reading such an exception into the statute would be contrary to Congress's intent.

Consideration of analogous cases confirms that no fraud exception should be read into Section 202(c). The President's decision to remove a Cabinet member is plainly unreviewable, and it would seem clear that a discharged Cabinet member could not obtain judicial review either of a claim that his dismissal had been induced by fraud or of a demand that he be reinstated. Yet under petitioner's logic (Pet. 11-12), it is a "universal principle" that judicial review is available to consider whether otherwise unreviewable action was fraudulently induced, and courts therefore would have jurisdiction in such a case. Moreover, under petitioner's theory, they presumably would have the power to order the President to reinstate a person who showed that his removal from the Cabinet had been tainted by fraud, just as petitioner contends that courts have power to reinstate him as Postmaster General, even though Section 202(c) provides that the Governors of

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removal only on account of continued violations of banking laws and required notice and a hearing (329 U.S. at 443). No such substantive or procedural standards are set forth in Section 202(c). Moreover, no claim of fraud was involved in *Agnew.* The decisions of the courts of appeals petitioner cites (Pet. 11-12) in support of his fraud exception do not support his argument either. Neither *Local 2855, AFGE* v. *United States,* 602 F.2d 574 (3d Cir. 1979), nor *Curran* v. *Laird,* 420 F.2d 122 (D.C. Cir. 1969) (en banc), involved the removal of a person from an office, and in each case the court concluded that the agency action at issue was unreviewable.

the Postal Service have the unqualified power to appoint and remove Postmasters General. It is clear that petitioner's argument for a fraud exception sweeps much too broadly.

Petitioner also contends (Pet. 17-22) that review is warranted to determine whether his removal violated statutory provisions other than Section 202(c). The court of appeals properly rejected petitioner's argument (Pet. 21-22) that review is warranted to determine whether, as Section 205(c)(1) requires, "an absolute majority of the Governors in office" voted to remove him. As it concluded, even on the assumption that such a claim is reviewable (Pet. App. 10a), it is uncontested in this case that a majority of the Governors in office voted to remove petitioner. His request that the court go further and inquire into their motivations in order to nullify certain votes is merely a restatement of his argument that review is warranted because his removal was fraudulently induced. Petitioner also contends (Pet. 18-19) that his removal was contrary to provisions of the United States Criminal Code. But while those statutes provide a basis for punishing any Governor shown to have violated them, they provide no basis for review of petitioner's removal.[2]

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[2] Petitioner cites (Pet. 22) *Doe* v. *Casey*, 796 F.2d 1508 (D.C. Cir. 1986), cert. granted, No. 86-1294 (June 8, 1987), in support of his claim that review is always available to determine whether an agency action violated a statutory command. That case is plainly distinguishable, so there is no need to hold this petition for *Webster* v. *Doe*, *supra*. At issue there is whether a removal pursuant to Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), which provides that the Director of the Central Intelligence Agency may terminate an employee "whenever he shall deem such termination necessary or advisable in the interests of the United States," is reviewable by the courts. The court of appeals found that review was not precluded because the statute "provides a standard – the termination must be 'necessary or advisable in the interests of the United States' " (796 F.2d at 1516). While we disagree that the "standard" of

Finally, even if the court of appeals' decision were not plainly correct, it would not warrant review by this Court. That decision turned on the court of appeals' reading of Congress's intent embodied in Section 202(c) and related provisions of the Postal Reorganization Act. Accordingly, the holding of the court below is limited in application to removals of Postmasters General and Deputy Postmasters General.[3] It seems unlikely that such removals will be contested with such regularity that this Court's attention is needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DOUGLAS N. LETTER
ROBERT D. KAMENSHINE
Attorneys

JANUARY 1988

Section 102(c) of the National Security Act provides a basis for judicial review, the relevant provision here, Section 202(c), provides no standard whatever for the removal of Postmasters General.

[3] Under 39 U.S.C. 202(d), which closely tracks the language of Section 202(c), the Deputy Postmaster General is appointed and removable by the Governors and the Postmaster General. An absolute majority of the active Governors and the Postmaster General is required to appoint or remove the Deputy. 39 U.S.C. 205(c)(2).

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No. 87-523

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Petitioner,

v.

JOHN R. McKEAN, Individually and as a member of the Board of Governors of the U.S. Postal Service, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert A. Saltzstein*
Joseph J. Saunders
Stephen M. Feldman

Wyatt and Saltzstein
1725 DeSales Street, N.W.
Washington, D.C. 20036
(202) 638-4485

Attorneys for Petitioner
**Counsel of Record for Petitioner Upon Whom Service Is To Be Made*

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1. The Solicitor General in his brief describes the events surrounding petitioner's removal as "a regrettable episode in the history of the Postal Service" (Brief in Opposition at 5). But this understatement is like calling Secretary of the Interior Fall's acceptance of oilman Edward Doheny's bribe in the Teapot Dome scandal (*infra* at 7) "unfortunate." Substitute Postal Governor Voss for Secretary Fall and the magnitude of the postal scandal parallels Teapot Dome of an earlier day. The case at bar commands exercise of the power of this court to dispense

equity and justice. The victim of the fraud here is the former Postmaster General who stood in its way and for his efforts was rewarded by a fraudulently-induced removal.

What petitioner requests is a trial in the United States District Court for the District of Columbia, denied him until this moment, with the ultimate relief to be determined by the trial judge. As the court of appeals' panel which heard petitioner's plea for an injunction pending appeal stated: "Should the appellant succeed in his appeal, the court would have authority to order relief that would make him whole" (Order of August 12, 1986, CA 86-1811). What is required is the trial to which the defrauded and damaged former Postmaster General is clearly entitled.

2. Respondents assert (Brief in Opposition at 5) that the court of appeals' decision does not conflict with any decision of this Court or another court of appeals. This is manifestly incorrect.

The decision of the court of appeals denying petitioner's claims to judicial review is in conflict with this Court's decision in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832), and other decisions of this Court cited in the Petition at 10-11. *Arredondo* sets forth a universal principle that decisions committed to agency discretion are not reviewable *except* in two circumstances: (1) where the agency action was tainted by fraud, and (2) where the agency had no authority to act *or* the decision was not reached in the manner prescribed by the relevant statute. Since petitioner alleges that his removal was invalid under *both* these tests, the decision below conflicts with the *Arredondo* doctrine.

The court of appeals' decision is also in conflict with decisions of the Third Circuit concerning the right to judicial review. That circuit has held in three cases that

> Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that . . . the agency's decision was occasioned by impermissible influences such as fraud or bribery, or that the decision violates a . . . statutory . . . command.

Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 580 (1979); *Kirby v. U.S. Government, Etc.,* 675 F.2d 60, 67 (1982); *Hondros v. United States Civil Service Com'n,* 720 F.2d 278, 293 (1983). These cases directly support petitioner's right to judicial review of claims that the Governors' decision was induced by fraud and did not comply with the command of 39 U.S.C. 205(c) (1) that a removal vote must be by "an absolute majority of the Governors in office."

The court of appeals' decision, in declining to review petitioners allegations as to the sufficiency and validity of the removal vote, also conflicts with decisions of the Third and Sixth Circuits holding invalid *in toto* collegial agency decisions which have been participated in by disqualified voters. The latter decisions are *Berkshire Employees Association v. N.L.R.B.,* 121 F.2d 235 (3d Cir. 1966), and *American Cyanamid Company v. F.T.C.,* 363 F.2d 757 (6th Cir. 1966).

3. Respondents beg the question when they argue that the Postal Reorganization Act vests complete discretion in the Postal Governors to appoint and remove Postmasters General. A fundamental error of the court of appeals' decision, echoed by the Solicitor General (Brief at 6-7), was seeking to divine the intent of Congress as to judicial review of removals of Postmasters General by looking only to the Postal Reorganization Act. Respondents slough off as the "*alleged* fraud exception" (Petition App. 9a, emphasis added) petitioner's claim to

judicial review based on *Arredondo* and other precedents of this Court.

The court of appeals' extensive discussion of legislative intent was unnecessary since there was no dispute here that the Act vests full discretion in the Postal Governors to appoint and remove a Postmaster General and does not contain a provision for judicial review of such decisions. However, Congress never enacted language stating that the Postmaster General could be fraudulently removed; that would have been contrary to the history of jurisprudence of this country.

Congress enacted the 1970 Postal Reorganization Act without effecting any change in the body of law applicable to fraud. Since repeals by implication will not be found unless an intent to repeal is clear and manifest, *Watt v. Alaska,* 451 U.S. 259, 267 (1981); *United States v. Borden Co.,* 308 U.S. 188, 198 (1939), this Court cannot conclude that by the 1970 postal legislation "Congress intended to create 'so great a breach in historic remedies and sanctions.'" *United States v. Borden Co., supra* at 198.

4. The best that the Solicitor General can say about *In re Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839), is that it is "relevant." The petition demonstrated (at 16-17) why *Hennen* is irrelevant, namely, it did not involve issues of fraud-tainted agency action.

5. Respondents argue that petitioner is not entitled to judicial review of his claim that his removal was invalid because two Governors who were disqualified from voting participated in the decision. Without these disqualified votes, there would not have been the "absolute majority" which 39 U.S.C. § 205(c)(1) requires. Respondents defend the court of appeals' declaration that a grant of judicial review would require the court to inquire into the "motivations" of the two disqualified Governors (Brief in Opposition at 8).

The issue is not the "motivations" of the disqualified Governors, but whether they were disqualified voters *as a matter of law.* This is precisely the type of question, even when a decision is committed to agency discretion, as to which the courts "still have the *obligation* . . . to scrutinize the action taken in order to determine whether specific . . . statutory, dictates . . .have been abridged." (Emphasis supplied.) *Local 2855, supra* at 583; *Kirby,* and *Hondros, supra.*

Not only was the vote unlawful because there were insufficient valid votes for the "absolute majority of Governors in office" required by the statute, but the *entire vote* was invalid because it was *tainted* by the participation of the disqualified voters. *American Cyanamid* and *Berkshire Employees Association* (cited in Petition at 19-20); also the opinion by Mr. Justice Brennan in *Pyatt v. Mayor and Council of Borough of Dunellen,* 9 N.J. 548, 89 A.2d 1 (1952), written when he was a justice of the Supreme Court of New Jersey (cited in Petition at 20).

6. The *Pyatt* case instructs about the doctrine of taint. There it was held that ordinances adopted by a borough council were infected with the taint of self-interest and were voidable if even one council member who voted was disqualified by conflict of interest. (89 A.2d at 4.) In *Pyatt,* Justice Brennan set forth language from another New Jersey case: "The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable." (*Id.* at 5). See also 1 Am Jur 2d, Administrative Law Section 68, at 864: "Participation in a determination by one disqualified member of a tribunal of three affects the action of the whole body."

7. Respondents take issue with petitioner's contention that Section 208(a) of the Criminal Code prohibited Voss from voting to remove petitioner from office. Section

208(a) prohibits an officer from participating in *any* matter, not merely judicial or quasi-judicial determinations, in which he has a financial interest. When Voss urged the other Governors to remove petitioner and when Voss himself voted for the removal of petitioner, Voss violated 18 U.S.C. 208(a) in corruptly engineering the removal of petitioner.

Respondents assert, however, that while Section 208(a) provides a basis for punishing any Governor shown to have violated that provision, Section 208(a)'s prohibition against conflicts of interest has no relevance to petitioner's right to obtain judicial review of the Governors' voting actions (Brief in Opposition at 8). However, Section 208(a) statutorily reinforces the common law rule prohibiting a person with an interest in a particular matter from being a decision-maker in respect of that matter. In simple terms, it was illegal for Voss to vote on petitioner's removal. The courts have the duty to determine whether the voting by the Postal Governors on petitioner's removal was tainted by this "impermissible influence." *Local 2855, Kirby, Hondros, American Cyanamid, Berkshire, supra.*

8. In their brief, respondents argue (at 5-6) that various actions, including criminal prosecutions and *ex post facto* adoption of a Code of Ethics for the Postal Governors, have adequately remedied the postal scandal. They resist, however, any kind of remedial action to set aside the unlawful decision, including declaratory relief, thus insisting that the fraud-procured decision of the Governors be allowed to stand. This is comparable to arguing that the Teapot Dome scandal would have been adequately dealt with merely by the prosecution and conviction for bribery of Secretary of the Interior Albert Fall (see *Fall v. United States*, 49 F.2d 506 (D.C. Cir. 1931)), without the civil action that was also taken to cancel the

Government petroleum contracts and leases which had been procured by the bribery and fraud (see *Pan American Petroleum and Transport Co. v. United States,* 273 U.S. 485 (1927)).

9. Respondents overreach by far when they assert that, under petitioner's theory, the courts would have the power to order the President to reinstate a person who showed that his removal from the Cabinet was tainted by fraud. It is commonly accepted that the President is entitled to have "his own people" in Cabinet positions, and that he should be free to remove them at his sole pleasure whenever his purposes would be served thereby. In this "political" area, practical as well as constitutional considerations dictate that the President be free from accountability to other branches of government for his decisions to remove political appointees.

Judicial review in the circumstances of this case, however, will not intrude upon Executive Branch prerogatives. The purpose of the Postal Reorganization Act was to remove the Postal Service from the political sphere. H.R. Rep. No. 91-1104, 91st Cong. 2d. Sess. at 1 (1970). No longer was the Postmaster General to be appointed and removed at the single pleasure of the President. By opting for a *collegial* appointing authority — the Governors — Congress imposed on those officers the established body of law governing collegial decision-making, with the judicial review attendant thereto (see discussion *supra* at 4-6). And by opting for a standard to govern removal from office — the "absolute majority" requirement — Congress rendered subject to judicial review removal actions in which the sufficiency of the vote is challenged.

Accordingly, to hold officials of an independent, non-political, agency accountable for their fraud-induced actions and invalid voting will not intrude upon Presidential

prerogatives or powers. The President's removal of officers requires no vote, since it does not involve participation by other persons. Therefore, this case does not affect the appointment and removal powers of the President. There is no legal or public policy reason why the Governors of the Postal Service, or similar officials of other independent agencies, should not be held to judicial accountability with respect to the matters which have been raised in this case.

10. Finally, respondents argument that the holding of the court below will have limited application because it turned on the court's reading of Section 202(c) and related provisions of the Postal Reorganization Act must be rejected. Contrary to what respondents say, the validity of petitioner's claim of fraud does not turn on interpretation of the statutory language of the Postal Reorganization Act. Rather, it turns on the jurisprudence this Court has propounded concerning fraud.

As previously noted, the decision of the court of appeals creates a conflict between the District of Columbia Circuit and the decisions of the Third Circuit in the *Local 2855, Kirby* and *Hondros* cases (*supra*) on the right to judicial review where agency actions results from non-compliance with a statutory command, such as the "absolute majority" requirement involved in the instant case. It also creates a conflict between the District of Columbia Circuit and the Third and Sixth Circuits as to the necessity of invalidating agency votes participated in by disqualified voters.

Contrary to what respondents state, resolution of these conflicts will not be limited in their effect merely to the removals of two Postal Service officers. Review by this court would affect other collegial agency decisions procured by fraud or tainted votes. This Court must reaffirm

that there are *no* circumstances under which fraud-induced agency actions and tainted agency votes will be permitted to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Robert A. Saltzstein
Joseph J. Saunders
Stephen M. Feldman

January 15, 1988